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COPY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

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PHILIP MORRIS COMPANIES, INC., et al.,

Plaintiffs,

-against-

At Law No. 760CL94X 00816-00

AMERICAN BROADCASTING COMPANIES, INC., et al.,

Defendants.

----------x

August 15, 1995
9:20 a.m.

HIGHLY CONFIDENTIAL - TRADE SECRET

Continued videotaped deposition of JOHN M. WHITMAN, taken by Defendants, pursuant to Notice, at the offices of McGuire Woods Battle & Boothe, Esqs., 901 East Carey Street, Richmond, Virginia, before Gail F. Schorr, a Certified Shorthand Reporter and Notary Public within and for the State of New York.

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ERRATA SHEET

Corrections or changes to the deposition testimony of:

John Whitman - Volume 2 (Aug. 15, 1995)

Page	Line	Correction
252	25	Change "reviewed" to "viewed"
259	14	Change "sure" to "clear"
260	22	Strike "measurements"
262	7	Change "testifying" to "representing to you"
275	2	Change spelling to "Annamanthadoo"
275	6	Change spelling to "Annamanthadoo"
279	18	Change "you mean" to "no solubles"
281	7	Change "per" to "prep"
283	2-3	Change "That wire's going to redrain from the water" to "That water's going to redrain from the wire."
291	2	Change "the cutoff date" to "the date cut off"
293	17	Change "attached" to "contained"
295	19	Change "solids;" to "solubles;"

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John Whitman

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ERRATA SHEET

Corrections or changes to the deposition testimony of:

John Whitman - Volume 2

Page	Line	Correction
298	13	Insert "in" after "the data,"
299	25	Change "does this" to "is this"
303	19	Change "fixed size" to "thick size"
306	11	Change "con." to "conc."
311	2	Change spelling to "Annamanthadoo"
312	17	Insert "I" before "will"
314	17	Change "clarification" to "quantification"
314	23	Change "selecting" to "collecting"
317	12	Change "You mean SEL?" to "In SEL?"
317	16	Change "Reading" to "During"
327	12	Change "objective" to "subjective"
344	5	Insert "not" between "would" and "be"
345	23	Insert "was" between "that" and "it"

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ERRATA SHEET

Corrections or changes to the deposition testimony of:

John Whitman - Volume 2

Page	Line	Correction
347	6	Insert "second" between "your" and "sentence"
357	9	Change "testimony" to "term"
359	25	Change "in there" to "in that regard"
360	25	Change "Can" to "Did"
363	24	Change "2022902592" to "2022902952"
364	15	Change "2022902592" to "2022902952"
365	5	Change "I have" to "I may have"
370	2	Change "suggestion" to "invitation"
371	17	Change "a" to "your" between "point" and "witness"
372	9	Insert "based" between "ketone" & "patent"
372	11	Change "colloquy" to "a discussion with you"
373	9	Change "question" to "patent"
378	20-21	[These lines cannot be heard on the videotape]

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ERRATA SHEET

Corrections or changes to the deposition testimony of:

John Whitman - Volume 2

Page	Line	Correction
379	3	Change "150935" to "110935"
380	14	Change "membrane-based extract" to "membrane-based process"
388	24-25	Change "using physical impossibility" to "issues of physical impossibility"
398	9	[The videotape says] change "6,078,362" to "678,362"
398	25	Change "2,083,622" to "283,622"
399	5	Change "8,002,487" to "802,487"
408	25	Change "saving" to "separating"
426	13	Change "SBC" to "SPC"
430	5	Change "going" to "goes"
436	21	Change "than" to "that"
441	5	Insert "Q:" before "How did you"
441	13	Change "went into" to "learned of"
451	10	Change "plants" to "plans"

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ERRATA SHEET

Corrections or changes to the deposition testimony of:

John Whitman - Volume 2

Page	Line	Correction
453	24	Insert "producing" between "in" and "reconstituted"
454	20-21	[These lines cannot be heard on the videotape]
455	9	Add "stem" after "treated"
461	13	Change "203148742" to "2031438742"
462	19	Change "temporarily" to "tentatively"
471	25	Change "PB" to "B"
476	18	Add "about?" after "anything"

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John Whitman

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ALSO PRESENT:

SHELLEY SANDERS, Videographer
Action Legal Video

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THE VIDEO OPERATOR: Good morning. This is the video operator speaking, Shelley Sanders, from Action Legal Video. Today is August 15th, 1995. This is videotape number 5, the continuation of the deposition of Mr. Whitman. The time on the screen is 9:19:59. You're on the record.

J O H N M. W H I T M A N,

resumed, having been previously duly sworn, was examined and testified further as follows:

CONTINUED EXAMINATION

BY MR. ROGERS:

Q. Good morning, Mr. Whitman.

A. Good morning, Alex.

MR. ROGERS: Before we start, Chip Nunley and I will just engage in a brief colloquy about my request yesterday for the production of the documents on which you relied in preparing your affidavit.

MR. NUNLEY: Let me just say that -- let me just say that I should hook my mike up to start. The documents that were identified yesterday to include I believe the TLA analyses,

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09:20:28 the documents that Mr. Whitman referenced from
09:20:34 July of '95 and I believe some blend component
09:20:38 studies, we began the process of verifying what
09:20:44 has been produced. As I told Alex and Denise
09:20:48 when we came in, there have been TLAs produced.
09:20:50 I think the TLAs produced related to RL. I
09:20:52 cannot this morning say what the time period of
09:20:54 the production was, either when the documents
09:20:58 were made available or the period covered. I'll
09:21:00 confirm that and let them know.
09:21:02 With respect to the work product
21:06 documents that Mr. Whitman relied on, those will
09:21:08 be pulled together and the intention currently is
09:21:12 to make those available to ABC. And although I
09:21:14 appreciate the offer to try to conclude the
09:21:16 deposition today, I think both from the
09:21:18 standpoint of making sure that we get everything
09:21:20 pulled together and delivered to ABC before that
09:21:24 portion of the examination occurs and can do it
09:21:28 in an orderly fashion, we'll do that, and
09:21:30 Mr. Whitman can be made available on short notice
09:21:32 to finish up the portion of the deposition
09:21:34 relating specifically to those documents.
21:38 MR. ROGERS: I appreciate that, Chip.

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09:21:40 Q. And I appreciate your indulgence, Mr. Whitman.

09:21:40 A. No problem.

09:21:42 Q. Between the time that we broke yesterday and this morning, did you review any Philip Morris documents relating to any subjects we spoke about yesterday?

09:21:52 A. Only with counsel.

09:21:56 Q. What specific documents did you consult?

09:22:00 A. The Park 500 overview document.

22:02 Q. The RL overview?

09:22:02 A. Yes.

09:22:08 MR. NUNLEY: These are documents, and I think if you want me to I'll show the witness, is this what you looked at, Mr. Whitman?

09:22:14 THE WITNESS: Yes, sir.

09:22:14 MR. NUNLEY: What those are, those are the confidential documents. We were trying to work through the designations on those.

09:22:22 MR. ROGERS: I see. Is it just that one that I see on the top?

09:22:24 MR. NUNLEY: We didn't go through that entire thing, but those are the pages from

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the summary judgment motion.

MR. ROGERS: Oh, I see. Okay. And these are all reflected in your letter to John Payton of last week?

MR. NUNLEY: Yes, right.

MR. ROGERS: Very good.

Q. We talked yesterday, Mr. Whitman, just about some of your own smoking practices. I want to ask you if you've ever been the subject of a Philip Morris test or experiment having anything to do with cigarettes or nicotine?

A. I'm not sure I understand the question.

Q. When we were discussing some of the POL and panel testing yesterday you indicated that for certain panels there were Philip Morris employees that sat on the panels and that were the testers, so to speak, of whatever product Philip Morris was considering at the time. My question to you is have you ever been a subject in a Philip Morris test regarding cigarettes?

A. Not that I can recall.

Q. Have you ever been asked about what you ~~reviewed~~ viewed as the subjectives of any Philip

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Morris product?

A. On a formalized basis as an actual respondent? No.

Q. How about informal?

A. Sure, yeah.

Q. Do you remember any specific context in which you were asked?

A. It relates back to the Next cigarettes.

Q. Did someone ask you your opinion of the subjectives of the next cigarette?

A. Yeah, very casual conversation, not part of a formal test.

Q. Do you recall who that was?

A. I believe it was Mr. Spielberg.

Q. The Howard Spielberg that we talked about yesterday?

A. Yes, sir.

Q. Can you recall any other conversations about it?

A. Not specifically.

Q. And did you tell Mr. Spielberg what you testified to yesterday, that is that you detected no discernible subjective difference

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between the Next product and I think the Cambridge brand that you ordinarily smoke?

A. Yeah, I don't remember if those were my exact words. I think I might have said something like I thought that the Next cigarette smoked okay to me. I'm not sure I drew a comparison.

Q. Okay. Yesterday I asked you about the section in your affidavit, specifically paragraph 23 where you state in the second sentence, "During the formation of the RL sheet, approximately 15 to 20 percent of the nicotine that was naturally found in the tobacco materials used to make the sheet is lost." And we spoke about some of the data that you had reviewed in preparation for this affidavit and then I showed you a few exhibits that were different than the data that you reviewed that dealt as well with alkaloid tests of RL product. If we take the 20 percent loss figure that you've used here, and I understand that you've given a range in your affidavit, but if we use the 20 percent loss figure and your estimation yesterday that the finished RL sheet is roughly somewhere between

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1.0 and 1.3; is that correct?

MR. NUNLEY: Objection as to form.

Q. Did you say yesterday that you thought that the finished RL sheet was between 1.0 and 1.3?

A. Most of the numbers I've seen in that regard were in that range. Some were slightly lower.

Q. Okay. And if we take your 20 percent loss figure in paragraph 23 of your affidavit, would you, therefore, state that the nicotine content of the raw materials in the RL process is roughly 1.25?

A. If that's the number that that divides out to, yes, somewhere in that -- somewhere in that range. Again, going back to a point that's made in the affidavit relative to differences caused by agricultural variations and so forth, all of those numbers that range is associated with them.

Q. But if we end up with roughly 1.0 and we've had a 20 percent loss, you'd agree that that would be roughly, we'd start out with roughly 1.25?

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MR. NUNLEY: Well, based on a calculation. You're not asking him based on analysis done of the alkaloids in the raw materials, you're saying --

MR. ROGERS: Absolutely not. Just based on his calculations, the numbers he's used and the numbers he testified to yesterday.

A. Rough estimate, sure, would be in that range.

Q. And am I right that blending will minimize variation in the tobacco raw materials that results from climate or growing conditions at the time?

MR. NUNLEY: Objection as to form.

Q. Do you understand my question?

A. Blending where?

Q. You testified that there's, as an agricultural product there's a variation in the content of the tobacco?

A. Sure.

Q. And my question is does blending in the RL process, blending the raw materials used in RL, which you talked about, Bright stems and various other components, will that minimize the

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degree of variability in the raw materials?

A. I can't really answer your question cause I've never seen any data that would address that particular concern. There's no attempt made to blend out nicotine variations.

Q. Okay. And in light of your testimony about the data on which you relied to prepare your affidavit and some of the exhibits that you were shown yesterday, is it accurate to say that Philip Morris measures nicotine in tobacco at only two points in the manufacturing process: Prior to tobacco's being blended and then 18 months later when the tobacco's in the finished sheet, would you agree with that statement?

MR. NUNLEY: Alex, which documents are you referring to that were exhibits yesterday?

MR. ROGERS: I don't have my list in front of me. I'm referring to the measurement of the alkaloid levels in the RLB and RLTC.

MR. NUNLEY: That was finished sheet, right?

MR. ROGERS: Yes.

A. Sir?

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Q. Yes.

A. You're referring to this document?

Q. I'm referring to that document and then I'm also referring to your testimony yesterday as to the documents you relied on in preparing your affidavit that you say documented alkaloid or nicotine measurements in RL and BL?

A. Yeah, but you have to go back to your question because it included a time frame and that kind of thing in there that I'm not sure what you're referring to, Alex.

Q. Sure. For the record, I think it was Exhibit 6 that I was referring to that had the alkaloid measurements on it.

A. The document is listed as six.

Q. Right. My question is in light of your preparation for the affidavit, having reviewed that data of nicotine or alkaloid measurements?

MR. NUNLEY: It's not nicotine or alkaloid measures. I think the documents you've shown him and what he's testified to are alkaloid measures.

MR. ROGERS: The documents I have, I

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think the documents he testified to yesterday showed nicotine measurements.

A. I think I was very specific going back and making it clear it was all alkaloid data on a dry weight basis.

Q. You didn't look at any nicotine measurements on documents in preparing your affidavit?

A. That says nicotine per se, my recollection sitting here without looking at the documents, again, is that it all said alkaloids, dry weight basis, but I'd have to go back and look at the documents to be ~~sure~~ clear.

Q. And nicotine is only one alkaloid. There are other alkaloids in tobacco?

A. That's my understanding.

Q. And so if we turn to paragraph 23 again of your affidavit, you refer in the second sentence to nicotine, not to alkaloid. What's the basis for using the word nicotine if the documents that you relied on spoke of alkaloid is my question?

A. Since nicotine is one of the alkaloids.

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09:32:00 Q. But you just testified that nicotine is one of the alkaloids. So if you were looking at alkaloid measurements I'm wondering how you can testify to nicotine measurements when there are other alkaloids in addition to nicotine?

09:32:28 A. Normally, when I see the measurements they're reported as alkaloids, and it may be interpretive on my part that that's normally a measurement of nicotine content.

09:32:42 Q. Would it then be more precise to say in paragraph 23 in place of the word nicotine which you used, the word alkaloid?

09:32:48 A. I would have to go back and look at those specific documents to see if it was a nicotine or an alkaloid measurement. I don't recall sitting here.

09:32:58 Q. I'm sorry. So you're not sure whether you were looking at alkaloid or nicotine measurements?

09:33:04 A. My recollection it was alkaloids ~~measurements~~. I'd have to look at the document again.

09:33:10 Q. If your recollection is correct that all you looked at was alkaloid measurements,

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would it be more precise to replace your use of the word nicotine with the word alkaloid in paragraph 23 of your affidavit?

A. That's probably the case. I would have to see the document again, though, to be sure.

Q. And let me return to my earlier question then. In light of reviewing data on nicotine or alkaloid measurements in preparing this affidavit, and based upon your knowledge of Philip Morris's cigarette manufacturing process, is it accurate to say that Philip Morris measures nicotine in tobacco at only two points in the manufacturing process: Prior to the tobacco's being blended and then 18 months later when the tobacco is placed in a finished cigarette rod?

MR. NUNLEY: Objection to form, Alex. You said measures nicotine in tobacco. I don't think that's the witness's testimony. I think his testimony is alkaloids in tobacco.

MR. ROGERS: Well, his testimony is he's not sure based upon --

MR. NUNLEY: But his best recollection is the documents he looked at and I

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think the documents he's talking about are the July '95 documents are alkaloid numbers.

MR. ROGERS: You're representing to me what he looked at exclusively are alkaloid measurements?

MR. NUNLEY: I'm not ~~testifying~~ representing to you anything. I'm saying what he testified to. I'll be glad to read it back to you if you'd like me to do that. He said "I'm sorry, so you were not sure whether you were looking at alkaloid or nicotine measurements?

"A. My recollection it was alkaloid measurements. I'd have to look at the document again." That's 9:32:58 through 9:33:08.

MR. ROGERS: I'm right where you are in the testimony.

Q. Let me just repeat it so I understand. Is it your understanding that the data you looked at revealed alkaloid measurements or nicotine measurements?

A. To the best of my recollection it's alkaloid measurements, but I'd have to go back and look at the document.

Q. Okay. Let me just return to my

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question then and stick with the words that I'll use as opposed to whatever the documents are because you've said that you were somewhat sure but you're not positive. I just want to know if I'm making an accurate statement in light of your knowledge of Philip Morris's cigarette manufacturing process.

Is it accurate to say that Philip Morris measures nicotine in tobacco at only two points in the manufacturing process. The first one being prior to the tobacco's being blended and the second one being 18 months later when the tobacco is placed in a finished cigarette rod?

MR. NUNLEY: Same objection, use of the word nicotine as opposed to alkaloids.

Q. You can answer the question if you understand it.

A. I understand the question but I can't answer it for several reasons. Number 1 is is that I'm not familiar with the cigarette manufacturing process from a closest to most knowledgeable of standpoint to answer that question.

Q. What if I replaced the word nicotine

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with alkaloid?

A. Same statement applies.

Q. Same statement meaning?

A. I do not know what level of testing is conducted within the primary processing or cigarette manufacturing operations.

Q. What stage of the process were the alkaloid data generated from on Exhibit 6, Whitman Exhibit 6?

A. This one?

Q. Yes.

MR. NUNLEY: You mean specifically on Page 2030961060, the portion of the document referred to yesterday?

MR. ROGERS: Yes.

A. The way that this data is presented says to me that this is finished sheet RL.

Q. And is that within what you describe as primary processing?

A. No, it's not.

Q. Is it within what you describe as cigarette manufacturing operations?

A. No, it's not.

Q. What stage would you describe it as

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being?

A. It's the finished product coming out of a processing plant, specifically Park 500.

Q. And then that finished sheet would be included in the term you used as primary processing?

A. Yes, sir.

Q. Just before we broke yesterday afternoon, we were talking about SEL, strong extracted liquor, and I was asking whether it was physically possible for SEL that had soluble levels below a target level could be returned to the pulper or inserted into the pulper, rather, and your testimony I think was you weren't sure. I want to move on from that point and ask you a few additional questions.

MR. NUNLEY: Wait a minute, Alex. I don't think that was his testimony.

MR. ROGERS: I'm at Page 238, Chip, I can just read it.

MR. NUNLEY: No, let me look at it. Alex, I think the way you asked the question mischaracterizes the testimony. He says --

MR. ROGERS: I'm at line 21 at Page

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238.

MR. NUNLEY: I'm going to get to where you are. But I think that you by selectively excluding what preceded it, you don't give the true flavor of the testimony. 233, 17, "Do you know of any instances in which SEL is added to the pulper?" 19, answer, "SEL?" 20, question, "Yes," 21 answer, "No." Then he says in response to the question on 238, you posed the question.

MR. ROGERS: Is it possible?

MR. NUNLEY: "If it's an impossibility, if it's a physical impossibility for SEL to be added to the pulper he can say that. If it's not, he can say it. If he doesn't, know he can say it," question "I simply asked the question is it possible for SEL that doesn't have the target level solubles to be added to the pulper?" He says "It's strictly a speculative answer. Is it possible? Sure." Now, your question says, "I was asking whether it was physically possible for SEL and your testimony was I think you weren't sure." What he testified yesterday was he's unfamiliar with SEL

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going to the pulper. You asked him a question that he said he could give you a speculative answer to physically possible, perhaps.

MR. ROGERS: That's fine. I'm actually not going to ask him about that at all, Chip.

MR. NUNLEY: Then you don't need to restate the question.

MR. ROGERS: I was laying a foundation to remind him of where we were yesterday when we left off. I'll accept your clarification and reading of the transcript. Let's move from that point forward.

Q. Because my question is not about your testimony, my question is about the next section of your testimony which I'll read to you.

A. What page are you on?

Q. I'm on the bottom of 238 to 239. Your answer that Chip --

MR. NUNLEY: He's on the --

A. I'm sorry.

Q. I apologize. Chip read the first two sentences of your answer on lines 21 through 23 of Page 238. You said, "It's strictly a

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speculative answer. Is it possible? Sure. But if that's the case then it's not really SEL," you said. And I asked "What do you mean by that?" And your answer is the following: "If SEL is strong extract liquor and what you're saying to me is that hypothetically you've run material through that first stage press there's something wrong with the press, let's say for the sake of argument, and so instead of coming out at whatever that target level is you've come out at one-fourth of that target level, it's not SEL." That was your testimony, okay.

And now I'd like to ask you about your affidavit and specifically paragraph 11. Do you have your affidavit in front of you?

A. Yes.

Q. Paragraph 11 spills over from five, Page 5 to Page 6.

A. Correct.

Q. And the sentence I'm going to ask you about is on the top of Page 6, and your affidavit states as follows: "The first stage press removes the greatest amount of tobacco solubles from the slurry. The liquid resulting from the

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first stage press is called 'strong extracted liquor' (SEL)." In your affidavit are you assuming a product from the first stage press that meets the target level of solubles?

A. I'm assuming that the process is in steady state and, therefore, yes, it's meeting the target level of solubles.

Q. Do you know of any instance in which the SEL that results from the first stage press did not meet the target solubles level?

A. Specifically an incident on a given date?

Q. Yes.

A. No.

Q. Have you ever heard of an instance in which the SEL did not meet the target solubles level?

A. Yeah. I can remember instances back in the late seventies in which we'd be having processing problems, equipment problems when that probably occurred.

Q. And so the SEL did not meet the target solubles level?

A. Again, I can't remember back 18 years

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ago, but if there was a problem with a press could that happen, the answer is yes, it could.

Q. And it's your testimony that even though what resulted from the first stage press -- I'm sorry. Your testimony in your affidavit is that even though that product would result from the first stage press, if it didn't meet the target soluble level you wouldn't call it "strong extracted liquor"?

MR. NUNLEY: You said your testimony in your affidavit. That's not covered in the affidavit, is it?

MR. ROGERS: No, I'm asking --

MR. NUNLEY: "Your testimony in your affidavit is that even though the product would result from the first stage" --

MR. ROGERS: I apologize.

Q. I'm asking about your testimony today.

MR. ROGERS: Thank you for the clarification.

Q. If the product even though it would result from the first stage press did not meet the target solubles level, is it true that you

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wouldn't call it "strong extracted liquor"?

A. Correct. I wouldn't refer to it as that.

Q. So can I, therefore, assume in paragraph 11 of your affidavit that the liquid to which you're referring to as strong extracted liquor is only that liquid that meets target solubles levels?

A. The target and whatever range is associated with that target.

Q. Okay. Do you know what the target level of SEL is for its solubles?

A. I really don't remember. I'd have to go back and look at the process specs.

Q. If you stay with me on paragraph 11, the next sentence makes a reference to RBW. Can you tell me what RBW is?

A. It's rich brown water.

Q. And where is rich brown water generated in the process?

A. From the paper making part of the operation, and I believe it's explained in detail later in the affidavit. The initial water that drains from the wire is SBW or strong brown

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09:46:28 water. That overflows into another collection
09:46:34 tank. That water along with additional process
09:46:36 water that's added to that tank, that mixture is
09:46:38 referred to as RBW.
09:46:44 Q. Why is the water brown?
09:46:50 A. The color comes from tobacco
09:46:50 solubles.
09:46:54 Q. So there are solubles in the SBW?
09:46:54 A. Yes.
09:46:56 Q. And there are solubles in the RBW?
09:46:58 A. Yes, sir.
47:00 Q. On average, do you know what the
09:47:02 soluble level of the SBW is?
09:47:12 A. Carrying these numbers around from
09:47:14 memory is difficult, but my recollection is that
09:47:18 SBW is about 2 percent, roughly.
09:47:26 Q. Do you know what the nicotine content
09:47:28 of the SBW is on average?
09:47:30 A. That's also referred to later in the
09:47:34 affidavit. Now, again, I believe that that's
09:47:34 alkaloid content.
09:47:42 Q. Could you refer me specifically to
09:47:44 the section of the affidavit that --
47:46 MR. NUNLEY: Paragraph 25, Page 12.

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A. Certainly.

Q. Is that the paragraph that Mr. Nunley's identified, is that the paragraph you that you were referring to?

A. Correct.

Q. And when you use the word nicotine in the second to last sentence, "the nicotine concentration," are you referring to alkaloid or nicotine?

A. Same discussion as we had before. My recollection is that it was alkaloid content, but I'd have to --

MR. NUNLEY: Alex, if you read the parenthetical at the end of the paragraph, I think it answers your question.

A. Excuse me, correct.

Q. You want to read that last sentence aloud.

A. "These numbers are based on measurements for total alkaloids, of which nicotine is the principal one in tobacco."

Q. So in your affidavit, do you routinely use the word nicotine interchangeably with the word alkaloid?

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MR. NUNLEY: Objection as to form. If you want to go through and look at each time it's used, that's fine. I don't think it's appropriate to ask him across the board on the affidavit?

09:48:40 09:48:44 09:48:46 09:48:48 09:48:48

A. I'd have to go back and look at all of the different measurements I looked at. In this particular case it's specifically alkaloids.

09:48:50 09:48:56 09:48:58

Q. Your testimony in your affidavit is that nicotine is the principal alkaloid in tobacco. Do you know roughly what percentage of the alkaloids nicotine comprises?

09:49:18 09:49:22 09:49:26 49:28

A. No, I don't.

09:49:28

Q. On what do you base that statement that nicotine is the principal alkaloid in tobacco?

09:49:30 09:49:32 09:49:32

A. I was told that by the analytical people in R&D.

09:49:34 09:49:36

Q. And who specifically told you that?

09:49:38

A. I really don't remember, Alex, but it was one of the people within that section.

09:49:48 09:49:48

Q. Yesterday you identified three people that you consulted at Philip Morris in preparing the affidavit I think, Dick Uhl, Mickey

09:49:50 09:49:54 49:58

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09:50:04 Annamanthadoo ~~Annamantajdoo~~ and David Williams. Was it one of
09:50:06 those three individuals?
09:50:06 MR. NUNLEY: No.
09:50:10 Q. David Merrill, I apologize, Mickey
09:50:14 Annamanthadoo ~~Annamantajdoo~~ and Dick Uhl. Was it one of those
09:50:16 three individuals that told you that?
09:50:16 A. No, it was not.
09:50:18 Q. Did the discussion that you had with
09:50:24 personnel in what you described as R&D about
09:50:28 nicotine being the principal alkaloid in tobacco,
09:50:30 did those occur in preparation for this
50:30 affidavit?
09:50:30 A. No, it did not.
09:50:32 Q. Do you recall when those
09:50:34 conversations occurred?
09:50:44 A. It was back at the time when I was in
09:50:46 R&D, back in the seventies, but specifically
09:50:48 when, I can't tell you.
09:50:54 Q. So the grounds upon which you make
09:50:56 the final sentence in paragraph 25 is your
09:51:02 knowledge from discussions that occurred back in
09:51:02 the 1970s?
09:51:06 A. Correct.
51:20 Q. I a moment ago asked you about the

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soluble content of the SBW. You estimated it was roughly 2 percent. Do you know what the soluble content of the RBW is?

A. My recollection is it's in the low 1 percent range, 1, 1.2. That's strictly from recollection.

Q. Is the soluble level of -- does Philip Morris measure the soluble level of RBW on a regular basis?

A. At Park 500 as part of the normal process operation, yes.

Q. Why does Philip Morris measure the soluble level of RBW?

A. In order to ensure the fact that we're operating under steady state conditions.

Q. What happens if the soluble level of RBW is below what you've described as the 1 to 1.2 percent range?

MR. NUNLEY: I'd ask for a time frame here since Mr. Whitman's been away from the plant for a number of years.

Q. Let's just say based upon your knowledge of the plant, and you can pick the time frame in describing your testimony, based upon

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your knowledge at X time, this is what would happen to the RBW if the soluble level was below what you've described as the 1.0 to 1.2 percent range.

MR. NUNLEY: Objection. Maybe I'm mistaken. I don't know that John testified that we measured solubles in RBW.

MR. ROGERS: I don't have the line, but he did just a moment ago. I said at Park "Is the soluble level -- does Philip Morris measure the soluble level of RBW on a regular basis?" Answer, I'm at 9:51:52, "At Park 500 as part of the normal process operation, yes."

MR. NUNLEY: All right.

Q. Okay, let me return to my pending question, which was based upon your knowledge of the RL process at Park 500 what happens to the RBW if the soluble level falls below what you've described as the 1.0 to 1.2 percent range?

A. What happens to the RBW? Nothing. It still goes back to the various parts in the process that it's used in.

Q. Are there any adjustments anywhere in the process that result directly from data

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indicating that the RBW falls below the target range?

A. There is no target range.

Q. Okay.

A. Not that I recall. It's strictly a measurement to ensure the fact that the process is in steady state. If, for example, you were starting up from a cold startup, what we referred to yesterday.

Q. Right.

A. Then initially you're starting up with fresh water, you have no solubles return, that would make some difference relative to how we would adjust from a solubles content in the CEL coming forward to put back on the sheet. But other than that, there's no effect and that's only for the first startup batch or so that goes through.

Q. And by CEL, you mean concentrated extract liquor?

A. Well, the size as it's applied to it.

Q. Let's take that comparison which you just made between what happens immediately after a startup situation and then what happens once

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09:55:00 the line has been running. What differences are
09:55:04 there anywhere in the process with respect to the
09:55:10 soluble content in the CEL between an instance
09:55:14 when you've just come off a shutdown and a time
09:55:18 where the plant's been running for some period of
09:55:18 time?
09:55:20 A. I'm sorry, say the first part of your
09:55:20 question again.
09:55:24 Q. Sure. I think my question was based
09:55:26 upon the following answer which I'll read back to
09:55:36 you. I'm at 9:53:56: Your last sentence was,
55:38 "If, for example, you were starting up from a
09:55:42 cold startup, what we referred to yesterday," I
09:55:44 said "Right," and then you continued and you said
09:55:46 "Then initially you're starting up with fresh
09:55:50 water, you have no solubles return. I take it
09:55:52 what you mean by no solubles return, ~~you mean~~ no solubles
09:55:54 from the RBW?
09:55:54 A. That's correct.
09:55:56 Q. And no solubles from WEL 3?
09:55:56 A. Correct.
09:55:58 Q. You said, "You're starting up with
09:56:00 fresh water, you have no solubles return, that
56:04 would make some difference relative to how we

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would adjust from a solubles content in the CEL coming forward to put back on the sheet" and then you finished, "But other than that, there's no effect and that's only for the first startup batch or so that goes through." That was the completion of your answer. I'm just now asking to focus on that comparison that you drew between a startup situation.

A. That's fine.

MR. NUNLEY: What is the question?

Q. My question is what adjustments are there in the soluble content in CEL between an instance where you've added fresh water because you're coming off a shutdown or a cold startup and normal day of operation that doesn't follow a startup? What adjustments?

THE WITNESS: Do you understand the question he's asking?

MR. NUNLEY: If you understand it that's what's important. I don't know that I do, but...

A. First of all, I made a correction to the fact that that's not CEL. It's size, correct.

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Q. Yes, you did, I apologize for that.

A. That's fine.

Q. So you meant the solubles content in the size?

A. Right. You probably in a given size ~~pre~~ prep batch would not have as much water content because there's no recycle stream going on. But that's such a minor adjustment.

Q. I'm not sure I understand. You use less water in a startup situation in the pulper than you do --

A. No, not in the pulper. Back in the size prep batch because of the fact there's not as great a total solubles content, right, in the DNCEL that's in the size prep batch that there's probably less water and probably by -- we're talking about an adjustment of less than 1 percent probably.

Q. Okay. Let me ask you about the first part of that answer you just gave and I'll read it to you, "Back in the size prep batch because of the fact there's not as great a total solubles content, right, in the DNCEL." When is there not as great a total solubles content?

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A. Just in the startup batch, probably.

Q. Why is the solubles content not as high?

A. Because you don't have the recycled water stream going through.

Q. So the recycled water stream adds to the solubles contents in the DNCEL?

A. It's the total solubles going through. I don't think you can make the statement from a concentration standpoint.

Q. What do you mean by total solubles going through?

A. Volume.

Q. So the solubles in the rich brown water add to the total solubles in the liquor stream that you've just described?

A. Not when you get to an equilibrium state. We were dealing with splitting hairs, okay. Let's take the process after that first batch and it's at steady state. As the affidavit states, you've reached a steady state, it's solubles that are in the rich brown water, the SBW and so forth have reached that steady state level, they're going to vary within given

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limits. That ~~wire's~~ water's going to redrain from the ~~water~~ wire. You've put it back in the pulper, it's going to drain from the wire not even at the same level. That's what I meant by total volumewise. You're going to lose more solubles going through the process.

I'm confusing you I think, but in other words, the process reaches a steady state. Forget the first batch, that's a startup situation. Once you reach that steady state, the solubles content of the RBW, the SBW, the WEL 3 reaches, hopefully, some steady state within operating limits.

Q. I understand that. My earlier question was I was trying to compare what you describe as the steady state of affairs and a startup situation, and I just was asking you initially what adjustments are made given the change in solubles level of the RBW and the process water which I take it has no solubles?

A. Minor adjustments.

Q. Can you describe what those are?

A. I can't give you a definitive answer to that. I don't even remember what control

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10:00:54 moves we make in that particular regard. But
10:00:56 it's for such a short period of time, and again,
10:00:58 just in that first startup batch.
10:01:00 Q. What period of time would that be?
10:01:04 A. An hour, roughly.
10:01:06 Q. Who would know what adjustments are
10:01:12 made between the first batch and the steady state
10:01:14 as you've described it given the change in
10:01:16 soluble levels?
10:01:18 A. Mickey would know the answer to that.
10:01:24 Q. The solubles in the rich brown water
01:28 are generated from the fiber once the fiber's
10:01:32 been separated from the solubles; is that
10:01:34 correct?
10:01:34 MR. NUNLEY: I object to the use of
10:01:36 the term generated.
10:01:38 Q. Do you understand my question?
10:01:40 A. No. Rephrase, please.
10:01:42 Q. When you're describing how rich brown
10:01:46 water is formed you said that water is applied to
10:01:50 the fiber I believe; is that not correct?
10:01:52 A. That's the water that's draining
10:01:56 through the wire. SBW is the first.
01:56 Q. Right.

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A. Right. RBW is that second stream.

Q. Okay.

A. Caused by the overflow of the SBW tank and the addition of fresh water to that.

Q. Okay. And does that process that you've just described occur after the separation of the solubles from the fiber?

A. It occurs during the sheet formation part of the process.

Q. Right. While the solubles in a separate part of the line are being concentrated, denitrated and processed?

A. That's correct.

Q. Okay. So we're on the fiber side. If you can divide the process between a fiber side and a liquor side. When rich brown water and strong brown water form -- we're on the fiber side?

A. On the sheet formation side, yes, the fiber side.

Q. And so the solubles in the rich brown water and strong brown water are coming from the fibers?

A. Correct.

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10:02:48 Q. They're not coming from the solubles that have already been separated from the 10:02:52 10:02:58 fibers? It's after the separation. That was a 10:03:02 bad question. It's after the separation of 10:03:04 fibers from solubles that rich brown water is 10:03:04 formed?

10:03:08 A. As the process is defined, that's correct.

10:03:10 Q. Okay. And the rich brown water is 10:03:16 formed when you apply water to the fibrous 10:03:18 materials?

03:22 MR. NUNLEY: Objection as to form. I 10:03:26 think he's explained once or twice how RBW -- 10:03:28 what RBW is a product of, but, John, you can tell 10:03:36 him again if Alex would like to hear it.

10:03:38 A. I'm having trouble understanding 10:03:42 exactly where -- I have described the SBW, RBW 10:03:42 twice.

10:03:44 Q. Yes, you have, and I just want to 10:03:46 make sure I've got it clear in my mind and clear 10:03:50 for the record. The rich brown water is formed 10:03:54 after fibers are separated from solubles?

10:03:58 A. It --

03:58 Q. After the press system?

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10:04:00 A. It's formed during the sheet formation part of the process. I'm not trying to confuse you or anything else, but the fact is is that RBW and so forth is used back in the press section, okay, to form WEL 2, WEL 3 and so forth as described within the affidavit. So I just want to make sure you're not confusing that part of it.

10:04:30 Q. No, I appreciate your clarification. Let me restate the question. The RBW and SBW are formed after the three presses?

04:46 MR. NUNLEY: Let me just object on this basis. Do you just mean -- you don't mean to say immediately after the three presses they're formed, you just mean somewhere downstream of those presses they're formed?

10:04:58 MR. ROGERS: Yes, that's exactly right.

10:05:00 Q. It's formed from the fiber side of the line?

10:05:04 A. It's formed. It doesn't mean RBW isn't used in those press operations.

10:05:08 Q. Absolutely. But you would agree that it's formed from the fiber side of the line?

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A. Fine.

Q. Okay. And when the rich brown water is added to the pulper and the second press and the third press, as you've described it in the affidavit?

A. Yes, sir.

Q. Where do the solubles in that rich brown water go?

MR. NUNLEY: Objection as to form. You mean where do the streams enter?

MR. ROGERS: Yes.

A. The solubles portion of what discharges the presses, with the exception of WEL 3, and we're talking only lines 1 and 2, right, goes back to the pulper head tank. The -- or into the pulper. The remaining solubles, the SEL and the WEL 2 go forward through the liquor cleanup stage and eventually through concentration and so forth.

Q. Just to clarify, I don't think you meant to say this, so I want to just make sure the record is clear. Your answer was "The solubles portion of what discharges the presses, with the exception of WEL 3, goes back to the

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pulper head tank." You didn't mean that?

A. No. WEL 3 goes to the pulper head tank.

Q. I just wanted to clarify because as it appeared on the screen it seems as though it was the opposite.

A. That's fine.

Q. So as I've just characterized it that's more accurate?

A. SEL and WEL 2 go through the liquor cleanup and the concentration and evaporation and so forth, stages.

Q. And you've said that there is a target soluble level for the SEL?

A. Again, from recollection, yes.

Q. And is there a target soluble level for the WEL 2?

A. My recollection is that there is a target for that also, yes.

Q. And was the soluble target level for the SEL, does that take into consideration solubles that are added by the RBW being poured into the pulper?

MR. NUNLEY: Objection as to form.

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What do you mean does it take into consideration?

Q. When you're calculating the SEL -- when Philip Morris calculates an SEL target level, you're not sure what it is but you said there is a target level.

MR. NUNLEY: Well, he said -- again, when you say "there is," and again, Alex, I'm having a problem with the failure to establish any type of time parameters for his testimony. If there's one today it's not relevant. If there was one 20 years ago, I mean I don't know where he is, I don't know where your questions are about this and if you want to leave the record in that state, that's fine, but I'll tell you to the extent you ask him questions that appear to be in the present tense I'm going to object if you try to use it at trial on the basis of relevance. What it is today is not relevant. I mean I've said it a couple of times, I'm not going to, you know, I just put you on notice if you're not going to draw a time frame, you want to ask it in the present tense, do that, but I'm going to object at trial that it's not relevant because of

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the ~~cutoff~~ cut off date.

Q. What's the time frame on which you've been basing your testimony this morning?

MR. NUNLEY: You can't do that unless you want to go back and ask every question. To say what is the time frame when you've asked questions what is it now, I mean that's just not appropriate. I've said we need to get a time frame. I've mentioned it a couple of times and we haven't gotten it. So either get a time frame or don't get a time frame, but if you don't I want to put you on notice I'm going to object to use at trial.

Q. Are you aware of any changes in line 1 that would affect your answer to any testimony this morning, that have occurred on line 1 that would affect any answer to a question I posed to you this morning?

A. Really, Alex, I'm having trouble understanding the question. Specifically what types of changes would you be referring to?

Q. Anything that would have changed your answer this morning to any question I've asked. In testifying this morning I've asked you a

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series of questions about the mechanics of the Park 500 process?

A. Correct.

Q. Okay. And during the course of your tenure at Philip Morris, have there been any changes in the mechanics of the RL process at Park 500 that would affect any testimony that you've given this morning?

A. Not that I'm aware of.

Q. Are you aware of any changes in the target solubles level of SEL?

A. Those are the types of things that for sure I wouldn't be aware of over the course of the last several years.

Q. When you said earlier that you, it was your understanding that there was a target soluble level for the SEL, what was that knowledge based upon and what was that time frame?

A. It's based primarily on my experience when I was first at Park 500 during the late seventies time frame and my experience as manager of process control and quality assurance.

Q. And since that time period, are you

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aware of any changes to the SEL target soluble level?

A. Am I personally aware? The answer is no, I wouldn't necessarily need to be aware, however, of any changes in that regard.

MR. ROGERS: Would you mark this as Whitman Exhibit 10.

(Whitman Exhibit 10 for identification, document, production numbers 2030361786 through 2030361798 and PA 138470 through PA 138482.)

Q. Mr. Whitman, you've just been handed what's been marked as Whitman Exhibit 10 which is a document on the first page of which appears to be a Xerox of a file folder and then there are documents ~~attached~~ contained thereto. As I did yesterday, I'll represent to you that this is the version, the form that the document was produced to us by Philip Morris. The production numbers are 2030361786 through 2030361798 and defendants' production numbers are PA 138470 through PA 138482. I'll state for the record that this document is marked trade secret. And I will direct your attention immediately to the second

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page so that you see that your name appears on the list.

Looking through this document, it appears to contain information about line 3 press design. Do you recall receiving any documents that are contained in Whitman Exhibit 10, or if it's just one single document, do you recall receiving a copy of it?

MR. NUNLEY: John, given that it dates from 1980, take whatever time you need to look at it.

THE WITNESS: Certainly.

A. I mean I don't remember this specific document, no.

Q. Do you remember any work around the time frame of May of 1980 on line 3 press design?

A. During the time that we designed line 3, we evaluated a Vari-Nip press instead of using a Renneburg screw press as the extraction press of choice for line 3.

Q. And which press was ultimately selected for line 3?

A. The Vari-Nip.

Q. And that's the press that's described

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in this document?

A. I think the document describes both presses.

Q. If you'll turn on the document to, I think it's easiest if I give you the Bates stamp number which is PA 138474, you'll find the number in the lower right-hand corner, the document is marked Page 2 on there.

A. Got you.

Q. Are we on the same page?

A. Yes, sir.

Q. And I want to focus on the material in subheading C, "Operating conditions." Do you see where I am on the top? And number 1 is "For all conditions" and then there's A through E. Assumption number 1 is "a. Assume no fiber losses; therefore, pressate solubles are equal to total ~~solids~~ solubles; b. RBW used for dilution on all presses except for Vari-Nip counter current operation where WEL 3 is used for dilution of press cake from press 1A; c. RBW is assumed to be 2 percent solubles, zero percent fibers."

You testified a moment ago that it was your understanding that the RBW ranged

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somewhere from 1.0 to 1.2. Is this 2 percent solubles inconsistent with what your understanding is of the soluble level of RBW?

A. It's inconsistent with my memory of where we might be operationally, but this is a specific test. I can't even comment on, you know, what total conditions they were running and so forth without reading through the whole thing in minute detail.

Q. And you say that it's your "memory of where we might be operationally." What's the time frame that you learned of that information about RBW's soluble level?

A. I'm doing it strictly from recall. I can't really even specify for you a time frame. As I said when I stated that, I was doing it strictly from memory.

Q. Okay. And let's turn to paragraph 25. Keep that page open if you wouldn't mind. Paragraph 25 of your affidavit, when you refer to nicotine concentration averages for the RBW, WEL 3 mixture, the RBW and the SBW, and on what did you rely in providing this data in your affidavit in paragraph 25?

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A. That again is the July 1995 data.

Q. So when I look at the July 1995 data I'll be able to perform the same calculations to achieve these numbers without consulting any other information?

MR. NUNLEY: Well, he doesn't have to assume what you'll be able to do. I mean when you get the data you'll be able to figure out what it is you can do, Alex.

Q. Mr. Whitman, if I look at the data and nothing else, will I be able to do the calculations that you've done in paragraph 25?

A. Where are you -- I'm trying to understand your question, Alex, from the standpoint of the fact of what are you referring to as calculations?

Q. I'm referring to the nicotine concentration levels in the second to last sentence of paragraph 25. You provide the following data, "The nicotine concentration average is approximately .006 (.06 percent) in the RBW WEL 3 mixture." Let's stop right there.

A. Sure.

Q. Will I be able to find this

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information in the July 1995 data?

A. Correct.

Q. Will I need to consult any other data in order to find this calculation?

A. It's not a calculation. May I clarify for you?

Q. Okay, sure.

A. It's not a calculation. It's an analysis. It's a piece of data and yes, that piece of data, to my recollection, is on that piece of paper.

Q. Do you know who generated the data in the July 1995 data on which you rely?

A. R&D.

Q. Do you know who specifically?

A. Who ran the tests?

Q. Yes.

A. No, sir, I don't know who ran the tests.

Q. Did you speak with anybody at R&D about the data?

A. Dick Uhl.

Q. Anybody else?

A. No, sir.

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10:20:20 Q. And this data, or these -- what would you call this, I'm sorry, data, in paragraph 21?

10:20:22 A. Yes.

10:20:26 Q. This data is based upon your review of the July '95 document and conversations with Dick Uhl that confirm that data?

10:20:30 A. Yes, sir.

10:20:30 Q. And nothing else?

10:20:32 A. Correct.

10:20:36 Q. Let's move to the second part of that sentence where you say "Approximately .003 (.03 percent) in the RBW." Is your answer the same for that data?

10:20:46 A. Yes, sir.

10:20:50 Q. Just the July '95 data and conversations with Dick Uhl?

10:20:52 A. Yes, sir.

10:20:54 Q. And let's go to the final section of that sentence, "Approximately .004 (.04 percent) in the SBW." Do you have the same answer for the basis upon which you've testified to this data?

10:21:06 A. Yes, sir.

10:21:08 Q. Okay. And to the best of your recollection, ~~does~~ is this July 1995 data upon which

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you've relied for your affidavit reveal a solubles level for the RBW of 1 percent or 2 percent or something else?

A. I'm doing it strictly from memory. I prefer looking at the document. My recollection is is that it's closer to 1 percent, but it's --

Q. Do you need to know the soluble level in order to provide the data that you provided in July 19 -- in your paragraph 25 of your affidavit?

A. I don't believe you need to know that number, no, not to do that -- not to do that analysis.

Q. How would you test nicotine concentration of RBW?

MR. NUNLEY: Just, Alex, just bound by reality, what we tested were alkaloids. I mean I just bring you back to the parenthetical.

MR. ROGERS: I appreciate that.

Q. Let's stick with alkaloids. I've used the word nicotine the last few minutes. Your answer isn't different if I use the word alkaloid, is it?

A. Again, going back to the exact

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statement that's in the affidavit, it's alkaloid content, right.

Q. So your testimony is based on alkaloid?

A. For this section, right, okay.

Q. And let's just return to my pending question. What's the procedure for testing alkaloid levels in RBW?

A. You'd have to ask the analytical folks at R&D who did that analysis.

Q. So you don't know?

A. I'm not -- I'm not familiar with the procedure per se, no.

Q. How are you sure that the data in paragraph 25 is correct?

A. I accept the fact that Anna- -- R&D does correct analytical procedures.

Q. But it's not based upon any calculations that you've performed?

A. That is correct.

Q. You're essentially taking the R&D people at their word?

A. Certainly.

Q. If you'll return to Whitman Exhibit

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10:23:42 10, the -- I want to take you to the fourth page,
10:23:48 which is PA 138473, at the top of which says
10:23:52 "Operating conditions and design calculations."
10:23:54 A. I'm lost.
10:23:56 Q. Sure. It's the fourth page of the
10:23:58 document just physically.
10:23:58 A. Oh, I'm sorry.
10:24:00 Q. And I'll give you the Bates number
10:24:10 which is PA 138473. Are you there?
10:24:10 A. Yes, Page 1.
10:24:12 Q. It says Page 1. I'm sorry for the
24:12 confusion.
10:24:14 A. That's fine.
10:24:14 Q. At the top of the page it says
10:24:18 "Operating conditions and design calculations."
10:24:22 Regrettably there's a trade secret stamp over the
10:24:26 first calculations in line 1 of B. Do you see
10:24:26 where we are?
10:24:28 A. Yes, sir.
10:24:32 REQ MR. ROGERS: I would for the record,
10:24:34 Chip, since we've made this an exhibit in this
10:24:36 deposition, ask for a copy of what's been marked
10:24:40 as Whitman Exhibit 10 that does not contain the
24:44 trade secrets stamp over any information in this

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document.

MR. NUNLEY: I think the document says 48.2 percent Sol.

MR. ROGERS: Are you prepared to stipulate today that that's what this document states?

MR. NUNLEY: I don't know that I'm prepared to stipulate today, but if you'll give me a chance, maybe I can confirm it and then perhaps I can stipulate to it.

MR. ROGERS: Okay. That would be fine.

Q. Do you see where it says average batch composition under letter B?

A. Yes, sir.

Q. And there are items 1 through 5, tobacco raw materials, primary liquor, secondary liquor, ~~fixed~~ thick size and broke. Do you know what primary liquor is?

A. I don't recall ever having seen the term.

Q. Have you ever seen the term secondary liquor?

A. No, I have not.

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Q. Looking back at primary liquor, number 2, the calculation, 1600 gallons of RBW times 8.34 pounds per gallon times 2 percent solubles. Looking at those figures, or rather that equation, does that help you understand what's meant by primary liquor?

A. No, it does not.

Q. Have you ever seen calculations that measure the quantity of RBW, the percent soluble and a pounds per gallon figure?

A. Not to my recollection.

Q. And just looking at what's marked here as B, average batch composition, have you ever heard that term, average batch composition?

A. Not in the context that it's listed here.

Q. I'm not sure I understand your answer. You have a different understanding of average batch composition?

A. I've never heard the term average batch composition. Batch composition would to me mean what are the percentages of the various raw materials that went into a batch.

Q. And when you say the various raw

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10:27:08 materials, you think that means item 1, tobacco
10:27:10 raw material?
10:27:10 A. That would be my understanding,
10:27:14 what's the actual blend composition of what's in
10:27:14 there.
10:27:18 Q. Would your understanding of batch
10:27:22 composition include any liquor?
10:27:26 A. No. Batch composition, again, to me,
10:27:28 is the blend formulation that goes in.
10:27:32 Q. You see item 4, thick size?
10:27:34 A. Yes, sir.
27:36 Q. What is thick size?
10:27:40 A. Thick size is a material that's
10:27:44 generated at the size press that's caused by an
10:27:52 increase in viscosity, the size as it's being
10:27:56 recirculated from the size prep tank to the size
10:28:00 press, and the increase in viscosity is normally
10:28:08 due to material that's on the base web called Dr.
10:28:12 Knife fuzz that comes off in that circulatory
10:28:16 stream and causes the viscosity to rise.
10:28:18 Q. What do you mean by viscosity?
10:28:20 A. The -- in layman's terms I would
10:28:24 describe that as the thickness of the solution.
28:36 Q. If you'll turn to -- again I

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apologize for not having better page numbers.

A. No problem.

Q. Let's use my production numbers again, PA 138476, and it's actually a chart that appears horizontally on the page, "Summary of design calculations." And it appears that there are five conditions and then there's a list of press names with Renneburg and Vari-Nip. If you move over four columns you'll see a heading called "Percent equilibrium pressate Sol. ~~Con.~~ Conc." If you look down in the notes on the same page you'll see that Sol. means solubles. So I want to focus on the subheading "Percent equilibrium pressate Solubles Conc." Looking at those numbers do you think Conc. is concentration?

MR. NUNLEY: Let me just say for the record that he didn't author the document. He can sit here and give you his interpretation of it, but I would object to introduction of the document unless you have Mr. Maher or Mr. Westra. I mean if you wanted him to speculate as to what they meant, maybe speculating as to what Conc. means is not that big of a leap. You get into some other areas it

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may be abject speculation, but.

MR. ROGERS: If we get to those areas where you think it's abject speculation just speak up and we'll confront it at that time.

MR. NUNLEY: Well, I think any, any questions to a witness who didn't author a document about what the document means calls for speculation of some degree. To my knowledge, whether it's abject or minor doesn't -- that's not a measure of its admissibility. Speculation is speculation.

Q. Looking at the data underneath the heading, Mr. Whitman, "Percent equilibrium pressate solubles Conc.," what do you understand that data to mean? Does that data have any significance for you, and if it does, could you describe that significance?

A. My interpretation of what's written there is that it would be the pressate solubles concentration. But that's my interpretation.

Q. You testified earlier this morning you weren't sure about a target solubles level for SEL. This document appears to have the figure 9.8 on each entry. Does that refresh your

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recollection about a soluble target level for SEL?

A. No, it doesn't strictly from the standpoint that this is a test.

Q. Okay, that's all on that.

MR. ROGERS: Why don't we take a break.

MR. NUNLEY: That would be great.

THE WITNESS: Sounds good to me.

THE VIDEO OPERATOR: We're going off the record. The time on the screen is 10:31:59.

(A recess was taken.)

THE VIDEO OPERATOR: This is videotape number 6, the continuation of the deposition of John Whitman. Today is August 15th, 1995. The time on the screen is 10:50:58. You're on the record.

Q. Mr. Whitman, earlier today I asked you about target levels of SEL in terms of solubles.

MR. ROGERS: Chip, I'm at Page 273 for reference.

Q. But I'll just read you the question and answer and then we'll just go from there.

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MR. NUNLEY: I don't think I have page numbers.

Q. I can just read the question and answer. Why don't I just read the question and the answer.

MR. NUNLEY: Give me the time from yesterday.

MR. ROGERS: 9:45:46.

Q. My question to you was "Do you know what the target level of SEL is for its solubles?" Your answer, and I quote, "I really don't remember. I'd have to go back and look at the process specs." What are process specs?

A. They're a set of specifications for the operating -- the process part of the operation at Park 500.

Q. And is it your understanding that there's a target level for solubles of SEL that's indicated on these process specs?

A. I would make the clarification, and I'm doing that from recollection, from the late seventies, early eighties, but my recollection of that time frame is yes.

Q. Do you have in your files process

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specs for Park 500?

A. No, I do not.

Q. Do you know whether there are process specs for Park 500 that exist today?

A. I have not seen them, so I can't for sure comment on their existence. I would assume that that's the case.

Q. What other information, to the best of your recollection, is contained in the process specs to which you were referring in your testimony this morning, other than the target level of solubles for SEL?

A. There would be target levels for the solubles, other solubles portions, target levels for the consistency of stock, that type of thing.

Q. Have you ever seen any target levels for alkaloids?

A. Absolutely not.

Q. How about target levels for nicotine?

A. Absolutely not.

Q. If you wanted to know today whether there are process specs for Park 500 who would you ask?

A. Either Mr. Narron or

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10:53:50 Mr. ~~Annamantajdoo~~ Anuamanthadoo.

10:53:58 Q. You indicated you weren't sure of
10:54:00 the -- whether there's a target level of solubles
10:54:06 for the SEL. Would you know what, on average,
10:54:08 what the nicotine content of SEL is?
10:54:18 A. Can I refer back to the affidavit?
10:54:20 Q. Sure. I'm asking about SEL. But
10:54:22 sure, you can refer anywhere in the affidavit.
10:54:26 A. Oh, S -- I'm sorry. SEL and SBW, not
10:54:26 focused.
10:54:30 Q. It's easy to get lost in the
54:30 acronyms.
10:54:34 A. Rephrase the question, I'm sorry.
10:54:34 Q. Sure. Would you know what, on
10:54:38 average, is the nicotine content of SEL?
10:54:38 A. No, I would not.
10:54:46 Q. If you had to estimate what would you
10:54:50 say the nicotine content of SEL is, based upon
10:54:52 what you understand to be the solubles level of
10:54:54 SEL?
10:54:54 MR. NUNLEY: Objection; calls for
10:54:54 speculation.
10:54:58 A. It really is speculative. I don't
55:00 remember the solubles level to even do an

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estimate.

Q. Have you ever seen any documents that refer to nicotine levels of SEL?

A. Not to my recollection.

(Whitman Exhibit 11 for identification, document entitled "Procedure for collecting SEL samples," production numbers 2030749658 and 2030749659, and PA 483705 and PA 483706.)

Q. Mr. Whitman, you've just been handed what's been marked as Whitman Exhibit 11, the title of which is "Procedure for collecting SEL samples." The Bates numbers are 2030749658 through 2030749659. Defendants' corresponding production numbers are PA 483705 to PA 483706.

MR. ROGERS: I will state for the record that this document is marked as confidential. It's my understanding that since the production of this document its confidentiality designation has been removed and there was a recent production of a document, of this document without the confidentiality designation. That's my understanding.

Q. Have you ever seen this document

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before, Whitman Exhibit 11?

A. Not that I can recall, Alex.

Q. Did you review every exhibit to defendants' motion and memorandum in support of summary judgment in this case?

A. Clarify summary judgment, I'm sorry.

Q. The documents that you described discussing with Mr. Nunley as to their confidentiality designation I take it were exhibits that defendants used in their motion for summary judgment. Is that your understanding?

A. Yes, sir.

Q. And my question was do you know whether you reviewed every exhibit that defendants used?

A. I'm really not sure.

Q. Okay. And it's your recollection that you've never seen this very document?

A. Again, from recollection, I've looked at so many documents.

Q. I understand. If you'll look at letter C, safety precautions, and I'll just read the first two sentences: "Refer to material safety data sheet on processed tobacco extract,

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MSDS number 05242. SEL is a tobacco extract and may contain high concentrations of nicotine which is readily absorbed through the skin." Looking at this document, does that refresh your recollection about the nicotine concentration of SEL?

A. I've seen no data on what that concentration might have been.

Q. Does that sentence strike you as incorrect, that SEL may contain high concentrations of nicotine?

MR. NUNLEY: Well, I object unless you want to quantify high concentrations.

MR. ROGERS: The document does. I'm asking in general terms. I haven't asked for a quantification ~~clarification~~.

Q. Does that sentence strike you as incorrect was my question?

A. We take normal safety precautions in handling any materials from any part of the process. So it would be a normal safety precaution we would take in collecting ~~selecting~~ samples.

Q. Okay. But returning to that second sentence, do you think that sentence is

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accurate?

MR. NUNLEY: Objection; compound.

Q. Okay, let's break up the sentence. "SEL is a tobacco extract."

A. SEL is the pressate from the first stage press in the separation of the solubles from the fiber.

Q. Is that first part of the sentence in Whitman Exhibit 11 correct, "SEL is a tobacco extract"?

A. In that context, in the context I just described, yes.

Q. The context you just described was the pressate from the first stage press?

A. Correct.

Q. And in that context -- is that the only context that you understand SEL to be?

A. Yes.

Q. Okay. So in the only context in which you understand SEL, that portion of this sentence in Whitman Exhibit 11 is correct, SEL is a tobacco extract?

MR. NUNLEY: Well, I object to the way you've twisted that around. I think what

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he's saying is in the context of it being a pressate he would agree with the way it's written.

MR. ROGERS: I just said the only context in which he understood and he said the only context that he understood was as a pressate.

MR. NUNLEY: And in the context of the pressate he said he would agree with it.

Q. Just to confirm it I was saying the only context in which you understood SEL, that part of the sentence is correct?

A. Yes.

Q. Yes. And the second part of the sentence, "And may contain high concentrations of nicotine." Based upon your understanding of SEL, is that correct?

MR. NUNLEY: Well, I object because he didn't write the document. I don't know, perhaps he knows what the author meant by high concentrations. I don't know. I don't know whether you're prepared to represent what it means. So unless you want to quantify it. I don't know whether it's high more than 1 percent,

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high more than 50 percent. I don't have any idea. So I object because I think as asked it's a vague question.

Q. Do you think the nicotine concentration of SEL on average exceeds 50 percent?

A. Do I -- I'm sorry, Alex. Say again.

Q. Sure. Do you think the nicotine concentration of SEL on on average exceeds 50 percent concentration level?

A. ~~You mean~~ In SEL? Again, from an opinion standpoint, I haven't seen any data so I mean you're asking me my intuitive reasoning, based on experience I would say no.

Q. ~~Reading~~ During the first sentence of section C, "Material safety data sheet on process tobacco extract," have you ever seen a material safety data sheet on process tobacco extract with the MSDS number 05242?

A. I honestly don't recall. I normally, normally don't look at material safety data sheets, but I don't recall specifically that document.

Q. Do you recall MSDS number 05242?

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A. No, sir.

Q. Is there a material safety data sheet for -- why don't you tell me what a material safety data sheet is?

A. To the best of my understanding, that's a document that's required from the standpoint of safety OSHA requirements relative to communicating to the work force what materials they would be handling.

Q. And then do the material safety data sheets comprise a material inventory report for each facility?

A. I honestly can't answer that question.

Q. Do you know what a material inventory report is?

A. The term escapes me.

Q. You can set aside that exhibit, I won't ask you any more questions about it right now.

A. That's fine.

Q. Before the break we were talking about those instances after a shutdown in which process water is used instead of RBW, comparing

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that situation to those instances, and I think you called it a "steady state" in which RBW was used instead of process water. And you had mentioned at one point that it was your understanding that there were adjustments made to the "size" when process water, meaning water without any solubles, is used after a shutdown period, adjustments in the size instead of RBW and I asked you specifically what those adjustments were. You weren't sure I think. Is that your understanding of our discussion?

A. Correct.

Q. My question is in those instances in which process water without solubles is used, is there any stage in the process in which solubles are added in order to raise the soluble level because there are no solubles in the process water?

A. No, sir.

Q. Is there a change in the water evaporation level when you use process water instead of rich brown water?

A. I'm really not sure, Alex. I'm just really not sure. It's such a small difference in

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total solubles content.

Q. Let's turn to paragraph 21 of your affidavit.

A. Paragraph?

Q. Paragraph 21, Page 10.

A. Excuse me.

Q. Sure. I'll just read a portion of it and then ask you a question. Paragraph 21 reads as follows: "To ensure uniformity and consistent taste the RL sheet is made according to certain specifications. For example, a certain percentage of the weight of the RL sheet must come from water solubles. In the case of RLTC, 41 percent to 49.5 percent of the weight of the RL sheet comes from water solubles. In the case of RLB, 42 percent to 50.5 percent of the weight of the RL sheet comes from water solubles."

On what did you base that testimony in your affidavit?

A. That is the finished sheet specifications.

Q. And how do you --

A. -- for those two products.

Q. I apologize for interrupting.

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A. I'm sorry.

Q. And how do you know that?

A. From my experience at Park 500.

Q. And were you relying in this testimony on specific finished sheet specifications for those products?

A. Yes, sir.

Q. And what were those finished sheet specifications on which you were relying?

A. I'm --

Q. I'm talking about particular documents. Are there particular documents or was this just based upon your knowledge of the finished sheet specifications?

A. It's based on my knowledge of that.

Q. And during the course of your entire tenure at Philip Morris, has the range for RLTC changed in any way? The range you give is 41 percent to 49.5 percent of the weight. Has that range changed?

A. I honestly don't recall. Not to my knowledge, but not that I recall.

Q. How can you be sure today, or rather on the date of the execution of this affidavit,

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that the range was 41 percent to 49.5 percent?

A. If I had to I could refer to the specification document.

Q. But you didn't in writing this affidavit?

A. Not that I recall, no.

Q. Were those figures -- strike that. Your understanding of the finished product specifications, when's the last time you saw printed finished sheet specifications for RLTC?

A. A specific date? The best I could do would be to tell you that it was probably sometime earlier this year.

Q. Sometime this year. And your recollection of those documents is that it provided a range of 41 percent to 49.5 percent?

A. For the RLTC product, correct.

Q. Right. And so when you provided this testimony in your affidavit, was it based upon what you saw within the last year in terms of the finished product specifications?

A. Within 1995, yes.

Q. If it's changed since then, since you saw it, would you know?

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A. I should.

Q. Why do you say you should?

A. Because those -- that range, as it states I believe somewhere in the affidavit, is the range of subjective acceptability and if we were going to change that that should be communicated through the general manager's position.

Q. So you would know ordinarily when there's a change in the finished sheet specification of any change?

A. Of any change that refers to a finished sheet specification for what -- whether it's subjectively acceptable or not? Yes.

Q. And this range is based upon tests of the subjective acceptability of RLTC?

A. That is my understanding, yes, sir.

Q. What do you mean by subjective acceptability?

A. That when included into our cigarette blends it produces a product that is subjectively acceptable from a cigarette smoking standpoint.

Q. Have you ever smoked a cigarette containing RLTC that wasn't within this range,

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either that was below or above that range?

A. Have I smoked cigarettes personally?

Q. Yes.

A. No, I have not.

Q. Have you seen any data reflecting the reaction of anybody who has smoked a cigarette containing RLTC that fell outside the target range in paragraph 21 of your affidavit?

A. Written communications? Not that I recall.

Q. Have you ever spoken with anybody about it?

A. Yes.

Q. What it tastes like?

A. Correct.

Q. Okay. Let's take the high end. Let's say that for some reason RLTC was produced with 55 percent of the weight of the sheet being water solubles. What would your -- based upon your discussions with people, what would that taste like and how would that taste be different? I understand that's a compound question.

MR. NUNLEY: Not only that, but it's

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speculative. I mean I think you can ask him if he's aware of people who have smoked sheet above 49.5, at what level it was above 49.5 and what they said about it. But to say assume someone smoked sheet at 55 what do you think they would say is just, now that is I think abject speculation.

MR. ROGERS: I appreciate that. I think you're absolutely right and at the risk of plagiarizing I will take every question you just asked, Chip.

MR. NUNLEY: I'll bill you for it.

Q. And that is are you aware of people who have smoked sheet above 49.5 percent soluble levels?

A. Yes, sir, I am.

Q. At what level was it above 49.5 percent?

A. I really don't remember the specific solubles levels, but they're in the low fifties, approximately.

Q. And do you recall what they said about it?

A. It was subjectively unacceptable.

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Q. What specifically was unacceptable about it?

A. That they did not get into.

Q. You indicate elsewhere in your affidavit that if you were below the specification level at some point you'll get so low in solubles that smoking it will be like tasting the taste of a brown paper bag I think is the terminology you used?

A. Yeah, that's the terminology that was stated to me.

Q. Stated by whom?

A. By people on an R&D smoking panel who smoked it.

Q. Do you recall who specifically that was?

A. No, I don't.

Q. And so in executing your affidavit in this case, you relied on what they told you?

A. That is correct.

Q. But you --

A. I -- go ahead.

Q. Have you ever smoked base web?

A. Yes, I have.

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Q. When was that?

A. Years ago. A specific year I couldn't even give you.

Q. How did you have occasion to smoke base web?

A. It was a test sample that was made by R&D.

Q. And what was your reaction to the taste of that base web?

A. I found it very offensive. I can't give you a real good ~~objective~~ subjective character to it. It certainly didn't smoke like an RL cigarette.

Q. And by offensive could you be any more specific?

A. I just didn't like it, but I can't give you a real subjective quantifier for that.

Q. Let's return to paragraph 21, that target range. I take it, and correct me if I'm wrong, and interrupt me at any point, we are at the stage when you've just come off a shutdown and so you're using in the pulper and in the second and third presses process water, not rich brown water, okay, we're at that stage.

A. Okay.

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Q. And that exists --

A. Okay.

Q. -- following a shutdown.

MR. NUNLEY: In the hour or so after shutdown.

A. For that one hour period of time.

Q. Right.

A. Yes.

Q. And that process water that we're using in place of rich brown water doesn't contain any solubles?

A. Correct.

Q. Okay. And following that processing for that one hour, if you did nothing differently than you had done before the shutdown in terms of the process, any mechanics in the process, if you did nothing differently so the only difference was you were using process water instead of rich brown water, would you have lower solubles on the finished RLTC or higher solubles?

MR. NUNLEY: Objection; calls for speculation I think unless you complete the variables in your hypothetical.

Q. What other variables do you need,

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Mr. Whitman, to answer my question?

A. Really a myriad of them. In other words, I'll give you an example, what is the concentration of solubles in the evaporator feed tank.

Q. Okay, let's stick with that variable. Does the concentration of the solubles in the evaporator feed tank ever vary?

A. Vary? Certainly.

Q. Okay. How about after the solubles exit the evaporator feed tank, does the concentration ever vary?

A. At what point?

Q. Immediately after you've evaporated the water so that you have turned the liquor into what you call CEL or concentrated extracted liquor?

A. I'm not trying to nit-pick with you, but realize the fact that the material coming out of the evaporators is no longer the material that came out of the evaporator feed tank.

Q. Okay.

A. You're now talking about CEL.

Q. Okay.

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A. Does that material vary? Certainly.

Q. Do you know how much the range of the variability is?

A. Alex, I don't carry those numbers around in my head. No.

Q. Does DNCEL vary in terms of the concentration level?

A. Yes.

Q. Do you know the range in which it varies?

A. No.

Q. If you didn't apply water to the fibers, the water that then becomes strong brown water and rich brown water --

MR. NUNLEY: Objection.

MR. ROGERS: I haven't gotten to a question yet.

MR. NUNLEY: I'm trying to save you the trouble.

Q. I take it that the solubles in the rich brown water and strong brown water came from the fibrous materials?

A. I believe we went through that before, yes.

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11:18:30 Q. Okay. I just want to establish it because we're going to go forward from that point and I want to make sure that each step of the process the record's clear on this and that I'm clear.

11:18:48 So there is a reduction in the solubles, in the soluble level of the fibrous materials after the rich brown water and the strong brown water are formed, the solubles have moved essentially from the fibrous material to what is now rich brown water and strong brown water; is that correct?

11:19:12 A. Say that again.

11:19:16 Q. Sure. You indicated that the solubles in the strong brown water and the rich brown water came from the fibrous materials?

11:19:26 A. Right. Again, during sheet formation and so forth, right, okay.

11:19:32 Q. And so I just wanted to make sure that there is a -- that having occurred?

11:19:38 A. Yes.

11:19:38 Q. The solubles moving from fibrous material to strong brown water and rich brown water, that there's a reduction in the soluble

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level of the fibrous materials. You've removed solubles?

A. Yeah. This is gonna sound like an awful complex explanation, but at which point that reaches a steady state equilibrium I'm not sure. Does that occur on the paper making machine, at the last stage of pressing and so forth? I'm really not sure.

Q. What do you mean by a steady state equilibrium?

A. That if you've got a -- let's take the fibrous portion in the head box, that's at approximately a one percent consistency, 1 percent fiber in water.

Q. Okay.

A. Okay. And the water is going to become -- when it drains through the wire SBW, is there any extraction still going on at that point? I would tend to doubt that. And you're confusing me is what I'm trying to say to you, that you're not extracting when you're going across the wire, you're simply draining that water off.

Q. Right, I didn't mean an extraction.

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I just meant a reduction in soluble levels of the fibrous material.

A. That's what I'm trying to say to you is I would doubt that at that point. The fibrous materials when did they reach their -- the point at which you're now going to form the base web and you have a residual amount of solubles that are in the base web, when did the fiber come in equilibrium with the water as it drains through the wire? Does that occur right at that particular point? I don't know the answer to that question.

Q. The solubles in the rich brown water and strong brown water were in the fibrous materials?

MR. NUNLEY: Let me object to that. I don't think they were in the fibrous materials. They're not in the fiber. I think that they are part of the stream that contains the fiber.

MR. ROGERS: Part of the stream. I accept that clarification.

Q. So that stream, the minute you've got the strong brown water and the rich brown water

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containing solubles, that stream has a lower level of solubles?

A. Which stream has a lower level? The fiber stream?

Q. Yes.

A. And that's what I'm trying to say to you. I -- you come out of the third stage press. Let's leave the WEL 3 and all that for a second. Now that's at a fairly high consistency, you squeezed it like we've described. That fiber now gets diluted again with RBW and continues to get diluted with RBW until -- and SBW until it eventually reaches the paper making machine. I'm assuming that there is no more extraction that takes place from the discharge of the third press till the time that that water comes through on the wire.

Q. But if the water comes through on the wire with solubles in it, where are those solubles coming from?

A. From the start of the process is what I'm trying to say. In other words, is there any additional minor soluble removal that comes while the material's being agitated in the stock chest,

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the machine chest and so forth? At some point it reaches a steady state condition.

Q. I understand at some point. I'm asking earlier than that.

MR. NUNLEY: Is your question this: At the stage of base web formation, when you have water draining through the wire, that if you look at the materials used to form the base web immediately before the drainage and immediately after the drainage is there loss of solubles?

MR. ROGERS: That's my question.

Q. Do you understand Mr. Nunley's question?

A. Say it again. Sorry.

Q. Sure. When you have water draining through the wire, if you look at the materials used to form the base web immediately before the drainage and immediately after the drainage, is there a loss of solubles?

A. If you took the total amount, if you took the stock as it's in the head box --

MR. NUNLEY: I think what he wants to ask you, John, is this. If you could stop the line and you pulled a sample immediately before

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drainage of base web material and immediately after drainage of base web materials and you looked at the solubles would there be slightly more solubles immediately before drainage and slightly less afterwards?

THE WITNESS: Yes.

MR. NUNLEY: Is that what you're getting at?

Q. That's my question. And your answer is?

A. Yes.

MR. ROGERS: I appreciate that, Chip.

A. I'm sorry for the --

Q. No, that's okay. I might not have phrased it in the proper way, but I think the record now shows exactly what I was interested in doing.

If you didn't go through the process of applying water to the fibrous materials, this process that we're talking about that then you get strong brown water, rich brown water from, could you make base web if you didn't do that?

A. At the start of the process?

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11:25:30 Q. No, just at that process. If you didn't drain -- if you didn't apply water to the fibrous materials, I take it that you -- well, why is water applied to the fibrous materials?

11:25:42 A. Again --

11:25:42 Q. After the three presses?

11:25:44 A. After the third press?

11:25:46 Q. Yes, after the third press.

11:25:48 A. You have to dilute the stock then so that the consistency is compatible with making a sheet of paper.

11:25:54 Q. You couldn't make a sheet of paper if you didn't apply the water?

11:25:54 A. That is correct.

11:25:58 Q. Okay. So you have to remove some solubles from the fibrous materials in order to form the base web after the third press?

11:26:10 A. No. I think that's where we're back to my original --

11:26:12 Q. Okay.

11:26:18 A. Once I'm finished with the third stage press now I have the -- without regard to fiber size because I still have to refine and so on and so forth, I'm at a point where I can make

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a sheet of paper with that fiber but not without diluting it down to a consistency in the 1 to 3 percent range.

Q. Why do you have to dilute the fiber down to a consistency in the 1 to 3 percent range?

A. In order to get uniform distribution of the fiber across the Fourdrinier wire.

Q. I see, and the water that you apply after the third press facilitates that consistency?

A. That's one of the steps in that regard, yes, sir.

Q. And if you didn't have the water, you might have some fiber that did have that consistency and some fiber that didn't?

MR. NUNLEY: Objection.

A. Probably --

MR. NUNLEY: Objection. I think it calls for speculation, but John can answer it.

A. Probably most of it does not -- in fact, probably all of it doesn't have that consistency.

Q. When you say consistency, consistency

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of what?

A. Consistency of what we call the stock or the fiber portion which is a measurement of, relative measurement of the amount of fiber to water in that stock.

Q. And does the soluble content of the fibrous material in any way affect consistency?

MR. NUNLEY: Object. Well, I object as to the form, but, John, if you can answer it, you're welcome to if you understand the question.

A. My recollection, and I'm doing it from recollection, is that consistency is strictly a measure of fiber content.

Q. Let's turn to paragraph 15 of your affidavit. That's on Page 8, and I'll just read it, "Evaporation of the previously added water is necessary because the solubles have previously been significantly diluted in the pulper and elsewhere in the process. If the added water were not removed, it would not be possible to recombine the solubles with the sheet because they would be more liquid than the sheet is capable of absorbing. The sheet would turn back

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into a slurry." Removing this added water in the evaporators has no effect whatever on the concentration of solubles, including nicotine in the finished RL sheet."

Your use of the word possible in the second sentence, "If the added water were not removed it would not be possible to recombine the solubles with the sheet because there would be more liquid than the sheet is capable of absorbing," my question is is an assumption in that statement, that statement, that second sentence is an assumption that you're applying the same volume of liquid to the base web under this scenario, the scenario of added water not being removed?

MR. NUNLEY: Objection. I think you're mixing apples and oranges as I understand your question. I think you have the concept you're just talking about now confused with what the concepts of 15 are.

Q. What did you mean by the second sentence, Mr. Whitman?

A. I'm confused by your question.

Q. Just focusing on your second

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sentence, "If the added water were not removed it would not be possible to recombine the solubles with the sheet because they would be more liquid than the sheet is capable of absorbing." To me that sentence contemplates a volume of liquid; is that correct?

A. Correct.

Q. Okay.

A. In other words, what's specifically referred to here is is that now you have the material that ostensibly, let's say it's been cleaned up and it's the evaporator feed tank material, but I'm not going to concentrate it through evaporation.

Q. Right.

A. I'm going to try and reapply that material to the base web.

Q. Right.

A. Can't do it.

Q. Why not?

A. Because it's such a humongous volume of water that it will just turn the base web back into a slurry.

Q. And that's what your statement here

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in paragraph 15 is based upon, right?

A. Correct.

Q. Okay. I'm asking what if you were to reduce the amount or rather reduce the volume of liquid that you would apply to the base sheet -- the base web rather, would it be possible to apply the solution with the added water in a lower volume level?

MR. NUNLEY: Objection to the hypothetical.

A. I mean that's really speculative. I don't know.

Q. Mr. Whitman, you told me that you smoked base web?

A. Correct.

Q. Base web is fibrous material without the liquor added to it, correct?

A. Right.

Q. Okay. And I take it when you add water to the solubles that there's been a change in concentration level of the solubles, you have a lower concentration level?

A. That's correct.

Q. Okay. And now I'm just asking what

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if you were to take that lower concentrated level solution and apply some of it to the base web, could you do that?

A. Some of that liquor at that lower concentration I suppose, I see no reason why, it doesn't make sense to me I guess is what I'm trying to say. Could it physically be done?

Q. Right.

A. I suppose.

Q. To me when I see the words "it would not be possible" that conjures in my mind a physical impossibility. Is that what you meant by this second sentence?

A. Yes, sir.

Q. Why would it be a physical impossibility?

A. Because if I take the volume of water at the relatively low concentration of solubles that are in the evaporator feed tank and try and put that back on the base web at the size press, it will turn to mush, it will turn back into a slurry.

Q. What if you simply reduce the volume of the liquor solution you apply to the base

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web?

MR. NUNLEY: Alex, I think you're taking the sentence out of context. He says if the added water were not removed it would not be impossible to recombine the solubles with the sheet. He doesn't say it would not be possible to recombine 10 percent of the solubles with the sheet. He says to recombine the solubles with the sheet.

Q. Implicit in your second sentence there when you say recombine the solubles do you mean recombine all the solubles?

A. Yes, sir.

Q. Okay. So then your second sentence could be or in fact what you meant by the second sentence, and I just want to make sure that we have it clear for the record is, it would not be possible to recombine all the solubles with the sheet?

MR. NUNLEY: No, now --

MR. ROGERS: He just said that, Chip.

MR. NUNLEY: But Alex, what you're doing is saying is there some place between zero

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and a hundred percent. He's just said that this suggests recombining a majority of the soluble portion with the base web. Now you're saying, well, could it be zero, could it be 10 percent, could it be 20 percent. I mean the question is nonsensical. The whole line of inquiry is nonsensical.

MR. ROGERS: I'm trying to understand what this sentence means.

Q. I'll read my earlier question. When I say "Implicit in your second sentence there, when you say recombine the solubles, do you mean recombine all the solubles?

"A. Yes, sir." So I --

A. Implicit in that is everything else that's included in here relative to the solubles losses through the evaporators and through the denitration and so forth.

Q. So my question had nothing to do with the majority of solubles. I wanted to make sure I understood what your second sentence was and that was "It would not be possible to recombine all the solubles with the sheet." Is that a correct understanding?

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11:35:36 A. Subject to the other limitations that are in here, relative to losses through the evaporators and losses with denitration and so forth, yes.

11:35:46 Q. Okay. But if you took the other scenario that I drew for you where you have not evaporated off the added water, you would apply some of the solubles, you could apply some of the solubles to the sheet but you wouldn't recombine all the solubles?

11:36:10 A. Again, I'm having so much trouble understanding why you're trying to do that from a process standpoint because the product you produce at that point's nonusable. Why would I want to do that?

11:36:20 Q. Why would it be nonusable?

11:36:24 A. In the scenario that you're painting I'm assuming that if you do that with only a small portion until it -- you turn it to mush and then you back off until it's not mush. I'm not even sure at which point it's going to stop being -- being able to be processed because of the volume of water you're going to put on there, and it's probably going to be a very low number,

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11:36:46 okay, then I'm going to fall outside of that acceptable solubles range from a finished product standpoint.

11:36:52 Q. Okay, I think I understand what you mean by your second sentence in paragraph 15.

11:37:04 Let's turn to paragraph 16: "After the soluble stream leaves the evaporator, which is commonly referred to as concentrated extracted liquor, CEL, next potassium nitrate, which is water soluble, is removed from the CEL." I want to skip down to the second to last sentence, "During this denitration process, some solubles, including nicotine are lost." What's the basis for that sentence?

11:37:36 A. Because the potassium nitrate as it discharges the centrifugation process is still brown in color, light brown, but it still has a brown color to it. So some of the solubles are definitely being lost.

11:37:52 Q. If solubles weren't lost, what would the color be?

11:37:54 A. White.

11:37:56 Q. That's what potassium nitrate, that's the color it is without solubles on it?

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A. Yes, sir.

Q. Do you know the quantity of nicotine that's lost during the denitration process?

A. No, I don't.

Q. If you had to estimate, roughly speaking, what would you say?

MR. NUNLEY: Objection; speculation.

A. It really is speculation. I really don't recall.

Q. Would somebody know the answer to that? Do you know anybody -- who would you ask if you wanted to know how much nicotine Philip Morris losses in the denitration process?

A. Who would I specifically ask? I'd probably ask Dick Uhl.

Q. Okay. When you were preparing this affidavit, did you ask him how much nicotine is lost in the denitration process?

A. No, I did not ask him specifically, no, sir.

Q. Did you discuss with Dick Uhl or anybody else in preparing this affidavit how much nicotine is lost in the denitration process?

A. How much, no.

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11:39:14 Q. Let's turn to paragraph 18 if we can, on Page 9: "At the time of the ABC Day One broadcast, Philip Morris manufactured two types of RL for use in cigarettes made and sold in the United States: RLB and RLTC. RLB and RLTC differed in the flavors that were added to the DNCEL as part of size preparation. None of the flavors, humectants or preservatives added to either RLB or RLTC contains nicotine." What's the time frame for that last sentence, "None of the flavors, humectants or preservatives added to either RLB or RLTC contains nicotine"?

A. Any time frame over which I'm familiar with the RL product.

Q. And what's that time frame?

A. In the case of RLB it's since 1977.

Q. And I seem to recall you discussing yesterday the addition of a, I don't know if you described it as a flavor humectant or preservative, but something added at some point in the RL process that contained nicotine. I think your recollection was sometime in the mid-seventies. Do you recall that testimony?

A. I think you're referring to a tobacco

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extract question that you asked me.

Q. That might have been.

A. Could you recall the testimony?

Q. Why don't I look at it at the break and do it so neither one of us is guessing.

A. That's fine.

Q. I apologize. It just popped into my head and I don't have the citation for you.

A. No problem.

Q. Do you know if any of the flavors added to either RLB or RLTC enhances nicotine delivery of a cigarette that contains RLB or RLTC?

MR. NUNLEY: Objection; compound and vague.

Q. Do you understand my question?

A. Repeat, please, or --

Q. Sure. Your last sentence of paragraph 18 talks about the presence of nicotine in flavors, humectants or preservatives. And my question is let's just take flavors. Do you know whether any flavors added to RLB enhance nicotine delivery of a cigarette that contains RLB upon combustion?

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A. Oh, I have no idea.

Q. For instance, let's take DAP. Would you call DAP a flavor, humectant or preservative?

A. Flavor.

Q. And do you know whether the addition of DAP increases nicotine delivery of a cigarette that contains DAP?

A. In the smoke situation?

Q. Yes.

A. I have no idea.

Q. What I mean is if you had two cigarettes, one containing DAP, one not containing DAP, all other ingredients being equal, do you know which cigarette or whether one of the cigarettes would give you a higher nicotine delivery reading on the FTC machine?

A. No, I have no idea.

Q. Do you know whether Philip Morris conducted any research into the effect of DAP on nicotine delivery?

A. Not that I'm aware.

Q. So your testimony in this affidavit is simply based upon the nicotine, the absence of nicotine in the flavors; is that correct?

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MR. NUNLEY: Well, it says exactly, I mean his testimony is exactly what it says, none of the flavors, humectants, preservatives added to either RLB or RLTC contains nicotine.

A. Right.

Q. But you don't know whether any of the flavors has any effect on nicotine delivery?

A. Correct.

Q. You don't know?

A. I don't know.

Q. And do you know whether any of the humectants added to RLB has any effect on nicotine delivery?

A. No, I have no idea.

Q. Do you have any knowledge as to whether the preservatives added to RLB enhance nicotine delivery?

A. I have no idea.

Q. Do you know whether any of the flavors added to RLTC have any effect on nicotine delivery?

A. No, I have no idea.

Q. Do you have any idea whether any of the humectants added to RLTC has any effect on

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nicotine delivery?

A. I have no idea.

Q. Do you know whether any of the preservatives added to RLTC have any effect on nicotine delivery?

A. I have no idea.

Q. Why don't we jump ahead in your affidavit to paragraph 38.

A. That is jumping ahead.

Q. Paragraph 38, I'll read the first portion and then I'll ask you a few questions about it.

A. Sure.

Q. "I've been told that ABC has asserted that Philip Morris has the 'technical capacity' to remove the nicotine from the solubles before they are recombined with the base web. That is not the case." Who told you that that was ABC's assertion?

MR. NUNLEY: If it's counsel or an attorney, you can just say that as opposed to naming them.

A. Counsel.

Q. Did you read any submission that ABC

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has made in this case dealing with Philip Morris's capacity to remove nicotine from solubles, or is the only source of your knowledge what counsel told you?

A. My recollection is it's what counsel told me.

Q. And your next sentence, "That is not the case," what does that mean that is not the case"?

A. It's explained in the next sentence.

Q. Okay. Let's read the next sentence. "I am unaware of any technology that would allow Philip Morris to remove the nicotine contained in the solubles in a commercially feasible manner." Do you use the terms technical capacity that appear in quotes in paragraph 38 and the term commercially feasible manner as synonyms?

MR. NUNLEY: Well, I object. I don't know that he uses the term technical capacity. The fact that he's showed it in quotation marks suggests it's used by someone other than the author.

Q. With that clarification, can you answer my question?

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11:46:38 A. Are they synonymous? I'm not sure
11:46:42 what you mean by synonymous.
11:46:42 Q. Sure. When I asked you what you
11:46:48 meant by the second sentence, "That is not the
11:46:50 case," I take it to mean "That is not the case"
11:46:52 refers to the preceding sentence which refers to
11:46:56 technical capacity to remove nicotine from
11:47:00 solubles. And when I asked you what you meant by
11:47:02 "That is not the case" you said it's explained
11:47:02 in the next sentence.
11:47:06 A. Right. That I'm unaware of any
47:06 process to be able to do that.
11:47:08 Q. I'm sorry?
11:47:10 A. I'm unaware of any process that you
11:47:12 could use commercially to do that.
11:47:20 Q. What do you mean by commercially when
11:47:20 you add that word to your answer?
11:47:24 A. There may be some method that you
11:47:26 could use on a laboratory scale to do that, I'm
11:47:28 not even aware of that. But from a commercially
11:47:30 feasible process, something that you could use
11:47:36 from a manufacturing operation standpoint, I'm
11:47:40 unaware of anything that I've seen that -- or
47:42 I've been told about in which you could remove

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the nicotine from that soluble portion.

Q. Just so I understand, what do you mean by "commercially feasible manner"?

A. That it would be applicable to a manufacturing operation.

Q. As opposed to what?

A. As opposed to something that could be used. Can I give you an example? It would be the same type of example as you used relative to the solubles addition. Can I go do what you suggested relative to that low concentration stream? The answer is yes, but it's commercially nonfeasible. From a manufacturing standpoint it makes no sense to do that and in fact defeats the purpose of the reconstitution process.

Q. Okay, and in that earlier discussion I took your testimony to mean that it was physically possible but you wouldn't produce the type of product that you wanted to produce; is that correct?

A. That's part of it. The other part of it was you probably couldn't produce any -- past a certain amount of that volume of water that you were referring to I can't even make a sheet.

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11:49:02 Q. Okay. And here when you used the
11:49:04 term in your affidavit, paragraph 38,
11:49:10 "commercially feasible manner," did you mean the
11:49:18 same thing as the technical capacity to do
11:49:18 something?
11:49:30 MR. NUNLEY: I think so the record is
11:49:32 clear we need to define technical capacity.
11:49:34 That's not his ~~testimony~~ term. That's an ABC term.
11:49:36 If you want to tell him what you meant by
11:49:40 including it in your briefs then he can probably
11:49:40 answer the question.
49:54 MR. ROGERS: Let me stick with my
11:49:58 pending question unless you're going to instruct
11:49:58 him not to answer.
11:50:00 Q. When you used the term in your
11:50:04 affidavit "commercially feasible manner," did you
11:50:08 mean the same thing as "technical capacity"?
11:50:18 A. I'm hung up on the term synonymous.
11:51:04 I would strictly focus on the fact that I know of
11:51:06 no process in which you can remove that nicotine
11:51:10 in a commercially feasible manner, in a manner
11:51:12 that I just gave you the analogy with from a
11:51:12 business standpoint.
51:32 Q. When you included that second

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11:51:38 sentence in your affidavit, what did you
11:51:42 understand the term technical capacity to mean?
11:51:44 I take it in the second sentence -- let me just
11:51:44 finish my question.
11:51:46 A. Go ahead.
11:51:48 Q. I take it from that second sentence
11:51:58 that you are stating unequivocally that Philip
11:52:00 Morris lacks the technical capacity, as you
11:52:02 understand the term technical capacity,
11:52:06 otherwise, you couldn't reject the first
11:52:10 statement unless you understood -- you had to
52:12 have some understanding of the term technical
11:52:14 capacity in order to write the second sentence?
11:52:18 A. But again, I go back to the fact that
11:52:20 it's from a manufacturing perspective. I know
11:52:28 of -- I'm not involved in any of our research
11:52:32 work. I know -- or anybody else's research
11:52:36 work. I'm not familiar with bench scale type of
11:52:38 tests and so forth. The fact is is that from a
11:52:44 commercial standpoint, okay, and I'm assuming
11:52:46 that when somebody says you have the technical
11:52:48 capacity to do something it means that it's also
11:52:52 business efficacious. From my perspective.
52:58 Q. Okay. So I understand, your

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statement in 38 is based on, paragraph 38, is based upon the assumption that you've just given me, and I'll read it back to you, "I'm assuming that when somebody says you have the technical capacity to do something it means that it's also business efficacious"?

A. To do that.

Q. Okay, and what do you mean by business efficacious?

A. It makes good business -- it's a commercially feasible thing to do and makes good business sense to go do that.

Q. What do you mean by makes good business sense?

A. It goes -- the only thing --

Q. You mean from a financial standpoint?

A. From any business standpoint. And I don't mean to keep going back to your analogy, it's just that you used it, it's a lot easier to relate to. From a business standpoint in what we discussed relative to the solubles example, it's from an economics standpoint, a subjectives standpoint. There could be a myriad of different business applications in ~~there~~ that regard.

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Q. I'm just trying to understand how you are answering.

A. That's where I'm going. I mean that from an entire business perspective.

Q. Okay. Does Philip Morris have the physical capacity to remove nicotine from the solubles before they're recombined with the base web? Is it a physical impossibility to remove nicotine from the solubles in the RL process?

MR. NUNLEY: On the scale of the RL process?

MR. ROGERS: On the scale of the RL process.

A. I know of no process that's available to be able to do that.

Q. From what you know of the RL process, is it a physical impossibility to remove the nicotine from the solubles?

A. From what I know of the RL process, correct.

Q. Correct it's a physical impossibility?

A. From my knowledge.

Q. ~~Can~~ Did you consult with anybody in

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preparing paragraph 38 of this affidavit?

A. Yes, I did.

Q. Who did you speak with?

A. The same three people that we referred to before.

Q. Anybody else?

A. Counsel.

Q. Did you conduct a patent search to determine whether or not your statements in here were true and accurate?

A. No.

Q. Who at R&D did you speak with?

A. Dick Uhl.

Q. Did Mr. Uhl mention any patents to you?

A. Other than the one that's referenced here? No, sir.

Q. So is it possible that Philip Morris has a patent to do the very procedure described in the first sentence in paragraph 38, that is to remove nicotine from solubles but you wouldn't know about that patent because you didn't do a patent search in drafting paragraph 38?

MR. NUNLEY: I think you've changed

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now the parameters of the question. He says he's unaware of any process to remove nicotine from the solubles on the scale of the RL process.

MR. ROGERS: And I'm just --

MR. NUNLEY: Now you switched gears and asked about a patent. If you have a patent you want him to look at, pull it out and let him look at it.

MR. ROGERS: I'm just trying to understand what he means by his awareness. And I just want to understand exactly what he bases his testimony on.

Q. Just so the record is clear, you base that testimony on your discussions with Dick Uhl?

A. Yes.

Q. You base that testimony on what else?

A. Those discussions that we had with counsel in preparation of the affidavit.

Q. But you conducted no patent search?

MR. NUNLEY: Asked and answered.

Q. You can answer again.

MR. NUNLEY: You can answer it again.

A. I'm sorry. I missed that?

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MR. NUNLEY: He's just asking you the question that he asked you before and he asked you before had you conducted a patent search, you said no, you hadn't.

A. That's correct.

MR. NUNLEY: He's probably going to ask you whether Mr. Uhl conducted a patent search which is already asked.

MR. ROGERS: Actually, that question wasn't asked and I wasn't going to ask it, but I will ask it now.

Q. Do you know whether Mr. Uhl conducted a patent search?

A. I have no idea.

Q. The only patent that Mr. Uhl referred to in your discussions with him in preparing paragraph 38 is the patent that you've referenced in paragraph 38, U.S. patent number 5,018,540; is that correct?

A. That's correct.

(Whitman Exhibit 12 for identification, document, production numbers 2022902491 through ~~2022902592~~ 2022902952 and PA 151529 through PA 151547.)

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Q. Before I ask you about the document, and I will identify it before I do ask you, did you read U.S. patent number 5,018,540 in preparing paragraph 38 of your affidavit?

A. Did I read the entire patent? No, we discussed the patent in general terms.

Q. Did you read any part of the patent?

A. In general terms, yeah, not line by line. There may have been sections I read line by line. I really don't recall.

Q. You've just been handed what's been marked as Whitman Exhibit 12, which is a document. The production numbers range from 2022902952 2022902491 through ~~2022902592~~. Corresponding defendant numbers are PA 151529 through PA 151547. I will note for the record that there is no confidentiality designation to this document, the front cover of which appears to be a chart or schematic of some sort.

Let's turn to the second page which appears to be an actual description of the patent. Do you see the name up at the top of the first column, John D. Hind, Richmond, Virginia? Do you know John D. Hind?

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12:00:14 A. I've heard of Mr. Hind. I don't
12:00:14 personally know him, no.
12:00:18 Q. Have you ever spoken with Mr. Hind?
12:00:28 A. I may have when I was first at R&D, but I
12:00:30 really don't recall.
12:00:32 Q. Can you recall having any discussions
12:00:36 with him about Philip Morris's capacity to remove
12:00:40 nicotine from an aqueous solution?
12:00:40 A. No, I do not.
12:00:48 Q. Have you ever seen this patent that's
12:00:48 marked as Whitman Exhibit 12?
00:50 A. No, I have not.
12:00:52 Q. If I could just direct your attention
12:00:54 to the first column on that same page and I'll
12:00:54 just read the text.
12:00:56 MR. NUNLEY: Well, if you're going to
12:00:58 ask him questions about the patent, so he can put
12:01:00 this thing in perspective to answer your
12:01:02 questions, I'd like to give him a chance to read
12:01:08 it, not selective paragraphs, but read the three
12:01:10 pages of the patent. I mean if your idea is to
12:01:12 ask him questions about whether or not this
12:01:16 process can be used to extract nicotine from the
01:18 RL process then I think he's entitled to read

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it.

MR. ROGERS: I accept that.

Q. Why don't you take a moment to look at the patent.

A. Clarification from the two of you. Is the larger print the same thing?

Q. It's my understanding that it is the same thing and it may be easier to read. But without taking the time to verify every word, I want to ask you about what appears to be the official copy and so if I can beg your indulgence to read the smaller print.

A. I'll try.

Q. I'd rather have your testimony based upon the official patent as opposed to the document that's attached to it.

A. It's really difficult in spots to read. Okay.

Q. If you'll look at the first column on the second page you'll see John D. Hind, Richmond, Virginia, assigner to Philip Morris, Incorporated, New York, New York, a corporation in Virginia. Were you aware that Philip Morris had been assigned this patent before reviewing

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this document here this morning?

A. No, I was not.

Q. And so I take it this patent was not reviewed by you in preparing paragraph 38 of your affidavit?

A. That's correct.

Q. Having read this patent this morning, what do you understand the process described therein?

A. This is strictly on interpretation of what's here?

Q. Yes. What do you understand the process that you've just read described in this patent?

A. He's using some means of solvent extraction and a -- to remove material from tobacco and then using some form of brine solution to selectively remove compounds.

Q. Why don't we turn to column 5 which is on the fourth page of this patent, PA 151532, left-hand column, the words "I claim" followed by a colon: "1. A process for selective removal of alkaloid from tobacco which comprises the steps of extracting tobacco with organic solvent,

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12:15:44 contacting the resultant solvent extract with
12:15:50 brine to remove alkaloids selectively from said
12:15:54 extract. Recycling the alkaloid relieved solvent
12:15:58 to tobacco, alkalizing the alkaloid enriched
12:16:02 brine, contacting said alkaloid enriched brine
12:16:08 with a second organic solvent to remove alkaloid
12:16:10 from said brine and recovering alkaloid from the
12:16:14 resultant alkaloid enriched second solvent."
12:16:24 That claim for this patent, were you aware that
12:16:30 brine can be used to remove alkaloid from a
12:16:30 tobacco extract?

16:34 MR. NUNLEY: Object, and I must say
12:16:38 this offends me a little. I want to make a point
12:16:40 on this. You've had some time to look at this
12:16:42 document, Alex. You seem to be suggesting that
12:16:48 this patent, this process somehow could be used
12:16:50 in the RL process.

12:16:50 MR. ROGERS: I haven't suggested
12:16:50 that.

12:16:52 MR. NUNLEY: You just mentioned
12:16:56 tobacco extract. I would draw your attention to
12:16:58 column 2 which specifically says that this patent
12:17:04 is based on a solvent that is methylethyl
17:06 ketone. Now, if you're suggesting that

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12:17:10 methylethyl ketone could be used in the RL
12:17:14 process as the basis for extraction, specifically
12:17:16 this says "Selection" --
12:17:16 MR. ROGERS: Chip, I have a question
12:17:20 pending. It was not the question. This witness
12:17:22 has read the entire patent. We took between 10
12:17:26 and 12 minutes for him to do so. Based upon
12:17:28 reading it he can answer my question and when I'm
12:17:30 complete with this deposition you're entitled to
12:17:32 ask him any question you want about any exhibit
12:17:34 I've entered or any exhibit you wish to enter
17:34 and --
12:17:36 MR. NUNLEY: Well, my problem with
12:17:40 that, Alex, is, in the carryover depositions I'm
12:17:42 never allowed to come in at the end of the day
12:17:46 and correct. What I'm told is no, it's not until
12:17:48 we've concluded our deposition that you can
12:17:52 start. That's why I object to what I think is an
12:17:54 attempt to mislead the witness by a patent based
12:17:58 on methylethyl ketone extraction and to suggest
12:18:02 that you somehow use tobacco extract under the "I
12:18:04 claim."
12:18:06 MR. ROGERS: I'm not trying to
18:08 mislead the witness. I was pleased at your

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12:18:10 ~~suggestion~~ invitation for him to take time to read the
12:18:12 entire thing, and I asked a question about a
12:18:16 paragraph under column 5 and I invite the witness
12:18:18 to give his answer and I don't think it's
12:18:20 appropriate, given that question that I have
12:18:26 pending, for you to read aloud a patent that he's
12:18:28 just taken 10 or 12 minutes to read.
12:18:28 MR. NUNLEY: Is there something in
12:18:32 the patent you don't want the witness to know
12:18:32 about?
12:18:34 MR. ROGERS: No. I sat here for 12
18:36 minutes while he read the patent and I asked a
12:18:38 question and I think I'm entitled to an answer to
12:18:40 that question. That's all I'm saying.
12:18:42 Q. We can go back to my pending
12:18:44 question. Having read that first item number 1
12:18:48 under "I claim," and I'm simply asking were you
12:18:58 aware, and I'm on 12:16:20, having read that
12:19:06 paragraph, were you aware that alkaloids -- that,
12:19:08 I apologize, that brine can be used to remove
12:19:12 alkaloid from a tobacco extract?
12:19:14 MR. NUNLEY: That has a methylethyl
12:19:16 ketone base.
19:16 MR. ROGERS: That wasn't my

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12:19:16 question.

12:19:20 MR. NUNLEY: Denise is shaking her
12:19:22 head. That's specifically what the patent is
12:19:24 based on.

12:19:26 MS. ESPOSITO: I'm shaking my head
12:19:28 for more than one reason. I think it's
12:19:30 inappropriate for you to direct your witness to a
12:19:32 particular line in a patent with the question
12:19:34 pending.

12:19:36 MR. NUNLEY: Well, is there something
12:19:40 about the fact that it's based on methylethyl
19:40 ketone that you disagree with?

12:19:42 MS. ESPOSITO: I don't disagree with
12:19:44 anything you've said or agree with anything
12:19:46 you've said. I think it's highly inappropriate
12:19:48 for you to point ~~a~~ your witness to a particular area
12:19:50 of the patent with a question pending.

12:19:54 MR. NUNLEY: Well, when a witness is
12:19:56 given a patent that you've had some time, months
12:20:00 to look at, and asked a question that I think is
12:20:04 misleading, then I apologize. I will at any time
12:20:06 direct the witness to a specific portion of a
12:20:10 patent of this type that provides a basis for the
20:14 patent that's not included in your question. You

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say a tobacco extract. This tobacco extract by terms of the patent is specifically a methylethyl ketone tobacco extract.

MR. ROGERS: Why don't we ask the witness what he understands the patent to be rather than hearing your testimony on that.

MR. NUNLEY: Do you disagree with me that this is a methylethyl ketone based patent?

MR. ROGERS: I'm not going to engage in a discussion with you. This is an opportunity for the defendants in this case to ask Philip Morris, a Philip Morris employee about Philip Morris documents that have been produced in this case, and I think I'm entitled to that. I have a question pending. I think the question is unobjectionable and I will simply repeat it and I think we ought to move on.

Q. Having read this patent today, Mr. Whitman, were you aware that brine can be used to remove alkaloids from a tobacco extract?

MR. NUNLEY: Same objection. John, you can answer.

A. Can you just restate the question, please, one more time, I'm sorry, Alex.

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12:21:20 Q. Sure. Having read this patent today, were you aware that brine can be used to remove alkaloids from a tobacco extract?

12:21:30 A. Prior to reading this?

12:21:30 Q. Yes.

12:21:32 A. I'm sorry.

12:21:34 Q. The first part of my question is having read this ~~question~~ patent today.

12:21:38 A. Say --

12:21:40 Q. Are you aware that brine can be used to remove alkaloids from a tobacco extract?

21:48 A. First of all, the paragraph 1 says for removal of alkaloid from tobacco which comprises steps of extracting tobacco with organic solvent. So in the context of with organic solvent, reading this that's what it says. Was I aware of that before seeing this document today? No, sir.

12:22:22 Q. What do you understand the term organic solvent to mean?

12:22:28 A. It refers back to the first part of the patent from what I could glean from it that refers to materials specifically MEK.

22:38 Q. Do you know what MEK is?

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12:22:40 A. It says methylethyl ketone.

12:22:44 Q. Do you know what methylethyl ketone is?

12:22:44 A. I really don't.

12:22:52 Q. Now having read this patent, do you know whether this process can be used to remove alkaloids from the solubles in the RL process?

12:23:14 A. I'm not a chemist and my answer to that would be on pure speculation the answer would be no because this is a solvent extraction as opposed to a water soluble fraction.

23:30 Q. How does the presence of an organic solvent affect your answer?

12:23:34 A. It's totally different chemistry.

12:23:42 Q. How would that change the ability to remove -- if you followed the procedures outlined in this patent, could you remove alkaloids from the solubles in the RL process? If you followed every procedure in this patent?

12:24:00 MR. NUNLEY: What is the question, if you followed every procedure in this patent what?

12:24:04 Q. Could you remove alkaloids from the solubles in the RL process?

24:06

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MR. NUNLEY: Let me say the question to me is nonsensical because if you followed every procedure in this patent you would have to do the RL process using methylethyl ketone, Alex.

MR. ROGERS: Why don't we have the witness answer my questions rather than you?

MR. NUNLEY: I'm not going to allow you to pose questions that are misleading.

MR. ROGERS: I don't see how my question is in any way misleading.

MR. NUNLEY: How do you use this patent, how do you follow the steps in this patent if the patent is based on methylethyl ketone extraction in the RL process?

MR. ROGERS: Why don't we simply let the witness answer my question.

MR. NUNLEY: No, I think I have the right to ask you to ask questions that are ground in fact. Now, if you're telling me that you have a good faith basis to believe that you can go through the steps of this process and end up with the RL product, then that's a point. But otherwise, I don't see how it's -- how you can

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12:25:00 even ask the question. How can you apply
12:25:04 methylethyl ketone to the RL process?
12:25:06 MR. ROGERS: I don't know. But I
12:25:10 wasn't asserting any basis at all. That's the
12:25:12 reason why we're here today asking these
12:25:12 questions.
12:25:20 Q. Having read this patent, do you think
12:25:24 alkaloids can be removed from the solubles using
12:25:26 this procedure in the RL process?
12:25:28 A. I've already answered the question.
12:25:34 My -- A, I'm not a chemist, okay. You're dealing
25:38 with two different methods of getting a soluble
12:25:42 fraction. So the chemistry is totally different
12:25:44 in this patent than what's contained in the RL
12:25:46 process.
12:25:48 Another point I would make to you is
12:25:52 the examples all refer to Burley leaf, not RL
12:25:52 solubles.
12:26:00 Q. Your answer to my question was
12:26:04 "You're dealing with two different methods of
12:26:08 getting a soluble fraction." Do you mean a
12:26:10 soluble extraction or do you mean soluble
12:26:12 fraction?
26:20 A. In the case of the RL process I use

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water, right, to separate the solubles from the fiber. Here he's using some form of solvent called methylethyl ketone, ostensibly, from what I can read in here, to do the same thing, I think. But --

12:26:40 Q. Do you know whether you could use methylethyl ketone in the RL process to extract the solubles? Could you?

MR. NUNLEY: Calls for speculation.

12:26:54 A. I really don't know.

12:26:56 Q. You don't know?

26:58 A. But you mean at the start of the RL process?

12:27:00 Q. You said that the extraction procedure described in the patent is different than the extraction procedure used today in the RL process?

MR. NUNLEY: Alex, is your question could you not use any water in the RL process instead use methylethyl ketone?

MR. ROGERS: That's not my question.

12:27:20 A. Yeah, that's what I interpreted your question to be.

27:26 Q. My question was do you know whether

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you could use methylethyl ketone in the RL process to extract the solubles as the extraction process is described in this patent?

A. You're confusing me. If I'm going to use MEK as the solvent instead of water as described in here?

Q. Let's take that scenario.

A. I would think that that's -- is it physically possible to do that? From a bench scale standpoint as described in here that may be the case. From a practical standpoint on an industrial application, I would doubt it, but that's strictly opinion.

Q. Are you familiar with the company Sepracor?

A. No, sir.

Q. Never heard of Sepracor?

A. No, sir.

~~MR. ROGERS: Would you mark this as Exhibit 13.~~

(Whitman Exhibit 13 for identification, document entitled "Nicotine reduction of an aqueous tobacco extract using a membrane based process system," production

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numbers 2031437082 through 2031437120 and PB ~~150935~~ 110935 through PB 110973.)

12:28:58 Q. Mr. Whitman, you've just been handed what's been marked as Whitman Exhibit 13 which is a document the cover page of which says "A proposal submitted by Sepracor, Inc. to Philip Morris U.S.A." The title is "Nicotine reduction of an aqueous tobacco extract using a membrane-based process system." The production numbers are 2031437082 to 2031437120. Corresponding defendant numbers are PB 110935 through PB 110973. I will state for the record that this document bears a stamp of highly confidential information.

Have you ever seen this document before?

A. No, sir.

Q. Let's just take the cover page, "Nicotine reduction of an aqueous tobacco extract using a membrane based process system." Have you ever heard of any procedure to reduce nicotine of an aqueous tobacco extract?

MR. NUNLEY: Same objection here as I had before. If you're going to ask the

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12:30:14 questions -- if you're going to ask the witness
12:30:16 questions about this document, I ask that he be
12:30:18 given a chance to look at it.
12:30:20 MR. ROGERS: I haven't asked a
12:30:20 question about the document.
12:30:22 MR. NUNLEY: You're saying asking
12:30:24 something about the front page of the document is
12:30:26 not a question about it, Alex?
12:30:26 MR. ROGERS: No. I'm not asking
12:30:28 about the contents of the document.
12:30:30 Q. The document has a cover page which I
30:32 just read, "Nicotine reduction of an aqueous
12:30:36 tobacco extract using a membrane-based ~~extract~~ process
12:30:40 system." My question was have you ever heard of
12:30:42 any procedure to reduce nicotine of an aqueous
12:30:44 tobacco extract?
12:30:44 A. I have not.
12:30:46 Q. You've never heard of any procedure?
12:30:48 A. I have not.
12:30:52 Q. Let's turn to the second page which
12:30:56 is the executive summary, one page, and I invite
12:30:58 you to read that page and then I'll ask you a
12:31:00 question about that page.
31:00 MR. NUNLEY: But that page is

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based -- but the executive summary is based on what follows and so the witness knows what the executive summary is based upon, I think he should be given the right to look at the entire document.

Q. Mr. Whitman, why don't you read whatever portion of the document you need to feel comfortable with me asking you a question about what appears in the executive summary.

A. I mean I've read through the executive summary. It would take me -- I wouldn't want to tell you how long it would take me to read the entire document to some level of understanding, probably a couple of hours.

Q. In preparing paragraph 38 of your affidavit, were you aware of this proposal by Sepracor to Philip Morris U.S.A.?

A. No, I was not.

MR. ROGERS: Why don't we break for lunch.

MR. NUNLEY: Are you going to ask more questions about 13 or are you finished with it?

MR. ROGERS: No, we might get back to

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12:35:30 13. We might get back to any of the other exhibits.

12:35:32 THE VIDEO OPERATOR: We're going off the record. This ends videotape number 6. The time on the screen is 12:35:49.

12:35:42 (Luncheon recess: 12:35 p.m.)

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